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A number of important cases have recently been before the New York courts, involving the validity of legislation intended for the benefit of labor in that case, the latest being a decision by the court of appeals of that State in the case of Treat v. Coler. The case was one of a contractor who had an agreement with the city for the building of a sewer. The sewer was built and accepted by the city authorities, but shortly after the completion of the work somebody wrote to the comptroller a communication setting forth that the contractor had made use in the work of granite which had been cut without the State, and protesting against the illegality of the transaction because of the violation of the so-called cut-stone law. This law required the use of stone dressed within the State in the performance of public contracts therein, and further prohibited the use of stone dressed in other States on such work, under the penalty of withholding the money due to contractors on their contracts. The comptroller refused to make any payment on the contract and the contractor applied for a writ of peremptory *mandamus*. The application was denied by the judge before whom it was made, but his decision was reversed on appeal to the appellate division of the supreme court. This court, which was divided upon the question, held in substance that the act was unconstitutional in so far only as it prevented contractors who had completed work from receiving their pay after that work had been accepted, and that any act which made such a confiscation of property was necessarily unconstitutional and void. An appeal was taken by the comptroller to the court of appeals, which has just rendered a final decision in the case.

The court recited that by the provisions of the statute the city and the contractor were forbidden to purchase granite dressed in any other State, and the citizen of any other State who had prepared carved stone for the market was virtually prohibited from selling the same for use in New York State in any public work. Such a statute the court held to be void, not only for the reasons given in the decision in the prevailing rate-of-wages case (Rodgers v. City of New York, 52 Cent. L. J. 181), decided a short time ago, but for the further reason that it was in conflict with the commerce clause of the federal constitution. It was, the court said, a regulation of commerce between the States which the legislature had no power to make. The citizens of other States had the right to resort to the markets of New York State for the sale of their products, whether cut stone or any other article, which was the subject of commerce. The citizens of New York State had the right to enter the markets of every other State to sell their products or to buy whatever they needed, and all interference with such interstate commerce by State legislation was void. This is a far-reaching decision, not so much in regard to the specific point decided as in relation to the general principle on which the decision is based. It is in line with the decision rendered by the court of appeals in the prevailing rate of wages case, and indeed, seems to follow logically after it. Taken together, the decisions upheld to a very marked extent the right, both of municipalities and of individuals to make contracts, and the corresponding obligations growing out of that right, and limit the power of the legislature to affect the making of contracts. They indicate very clearly also, that there are limits beyond which the legislature cannot constitutionally go in enacting laws in the interest of a class.

Physical resemblance as evidence of kinship, often used in bastardy proceedings, has recently been resorted to in the case of State v. Harvey, decided by the Supreme Court of Iowa, though in that case it was held that it would be error to permit the exhibition to the jury of a child under two years of age for the purpose of showing its resemblance to the defendant, and thereby establishing its paternity. In that case the child exhibited was nine months old. The Iowa court was embarrassed by the fact that in a previous decision by the same tribunal it had been held that a child two years and one month old might be exhibited, though the exhibition of one three months old had been adjudged error in another previous

case. In the Harvey case the court, referring to the above cases, said that "while conceding that resemblances often exist between persons who are not related and are wanting between persons who are, the ruling seems to rest on the proposition that 'what are called "family resemblances" are sometimes so marked as scarcely to admit of a mistake.' With respect to proper age, it was said that 'a child which is only three months old has that peculiar immaturity of features which characterizes an infant during the time that it is called a "babe." A child two years old or more has, to a large extent, put off that peculiar immaturity.' If this is to be the criterion, then surely a child of nine months is too immature to afford aid to the jury in settling its paternity. True, resemblances then are frequently imagined. But what one will construe as a similarity, another, with the same knowledge of the parties between whom the comparison is made, will be unable to detect. If alike in some respects, they differ in others. It is all a matter of notion, fancy, or guesswork, and ought not to be given the slightest weight in determining an issue fraught with such grave consequences. In People v. Carney, 29 Hun, 47, the court, observing that children of the same family have eyes and hair of different colors, declared that it is 'a dangerous doctrine to permit a child's paternity to be questioned or proven by the comparison of the color of its hair or eyes with that of the alleged parent.' In Hanawalt v. State, 64 Wis. 84, 24 N. W. Rep. 489, the exhibition of a child under a year old was held to have been improper, the court saying: 'In any case this kind of evidence is inherently unsatisfactory, as it is a matter of general knowledge that different persons, with equal opportunities of observation, will arrive at different conclusions, even in the case of mature persons, where a family likeness will be fully developed if there be any; and, when applied to the immature child, its worthlessness as evidence to establish the fact of parentage is greatly enhanced, and is of too vague, uncertain, and fanciful a nature to be submitted to the consideration of a jury.' As opposed to such exhibitions, see, also, Clark v. Bradstreet, 80 Me. 466, 15 Atl. Rep. 56, 6 Am. St. Rep. 221; Risk v. State, 19 Ind. 152; Reitz v. Same, 33 Ind. 187; Ingram v. Same, 24 Neb. 33, 37 N. W. Rep. 943. Without expressing an opinion as to the correctness of State v. Smith, *supra*, this court is not prepared to extend the rule there approved, and sanction the exhibition of a child under two years of age to the jury, as affording any aid in ascertaining its parentage; and in this class of cases, where, as is well known, the feelings and sentiment so often enter into the contest, the exhibition of the fruit of the unlawful relation cannot have been otherwise than extremely prejudicial."

NOTES OF IMPORTANT DECISIONS

ATTORNEY AND CLIENT — ACTION FOR SERVICES—EVIDENCE OF VALUE.—In Calhoun v. Akeley, 85 N. W. Rep. 170, decided by the Supreme Court of Minnesota, where in an action to recover for legal services rendered by plaintiffs to defendant in preparing for trial and trying a lawsuit it appeared that plaintiffs and R, another attorney, having another case of the same general character, and arising out of the same transaction, agreed that there should be an exchange of services, plaintiffs to assist R in his case and he to assist them in the one in which this defendant was their client. This agreement was communicated to defendant and he acquiesced in it, was present at the trial, knew that R aided in preparing his case for trial and in trying it, and consulted with him in reference thereto. It was held under these circumstances, that the court below did not err when it charged the jury that in determining the value of plaintiffs' services they would have a right to take into consideration the services rendered by R; and that, notwithstanding the bill of particulars furnished by plaintiffs upon demand to defendant, it was not error to allow practicing attorneys, properly informed as to the details of the suit in question, to give their opinions as to the total value of the services rendered.

EQUITABLE INTEREST IN REAL ESTATE—SALE ON EXECUTION.—Oregon following the weight of decisions decides in Silver v. Lee, 63 Pac. Rep. 882, that where an insolvent debtor purchases land, and causes it to be conveyed directly to his wife, he has no interest therein which is subject to sale on execution against him, and the purchaser at such an execution sale acquires no title, since whatever interest the debtor had in the land can be reached only in equity; and that where plaintiff's only title to land depended on his adverse possession thereof, and the defendant was in possession when the action in equity was brought to establish title and cancel a deed, the complaint will be dismissed, since, when the estate is legal in its nature, a court of equity will

not assume jurisdiction of the suit of the owner to try title, unless he is in possession. The court says in part:

"Where land is purchased and paid for by one person, but conveyed to another, a trust results in favor of the person who paid the price (Parker v. Newitt, 18 Oreg. 274, 23 Pac. Rep. 246; Taylor v. Miles, 19 Oreg. 550, 25 Pac. Rep. 143); but it is a mere equitable interest, and in this State cannot be seised or sold on execution. Smith v. Ingles, 2 Oreg. 43; Bloomfield v. Humason, 11 Oreg. 229, 4 Pac. Rep. 332. Nor in such case can the title be reached by an execution against the *cestui que trust*, even if the conveyance was made for the express purpose of defrauding creditors. The property may, of course, be made to contribute to the payment of the debts of its real owner, but the remedy of the creditor is in equity, and not at law. Mr. Freeman says: 'Where a debtor has fraudulently conveyed his property, it may be taken on execution against him, because, in favor of his creditors, he is still considered as the owner of the legal as well as of the equitable title. But when he has fraudulently bought property, and had the title taken in the name of another, the circumstances are different, though the object is the same. If the transfer were treated as void, the title would remain in the person of whom the purchase was made, and this would be of no advantage to the creditors. The transfer must therefore be treated as valid, and as transmitting the legal title to the person named in the deed. This legal title cannot be reached by the levy of an execution against the debtor, because he has never owned it. The creditors must therefore resort to equity, except in a few States, where statutes have been enacted to enable them to reach it at law.' 1 Freem. Exns. (3d Ed.), § 136. See also 14 Am. & Eng. Enc. Law (2d Ed.), 313; Wait, Fraud. Conv. § 57; Robertson v. Sayre, 134 N. Y. 97, 31 N. E. Rep. 250; *In re* Estes, 6 Sawy. 459, Fed. Cas. No. 4536.

"It follows, therefore, that the plaintiff has no standing in equity, on the theory that he has an equitable title which he could not assert at law; for no title or interest whatever in the property was acquired by the sale under the judgment of Hanthorn & Co. His title, then, rests entirely upon adverse possession, and, before he can assert such a title in equity, he must be in possession of the property. Coolidge v. Forward, 11 Oreg. 118, 2 Pac. Rep. 292; O'Hara v. Parker, 27 Oreg. 156, 39 Pac. Rep. 1004."

RAILROAD COMPANY—CROSSING ACCIDENT—CONTRIBUTORY NEGLIGENCE.—In New York, S. & W. R. R. v. Moore, 105 Fed. Rep. 725, decided by the United States Circuit Court of Appeals, Second Circuit, it was held that one driving onto a railroad track just in front of a rapidly approaching train cannot be held guilty of contributory negligence as, matter of law, it being impossible, because of obstructions, to see the train till the team was on the track, though he did not stop his team to listen; he having approached at a walk, and testified that as he approached the track he was listening for a train, and did not discover it until he was on the track, and that his horses, though afraid of cars, did not act as though they heard anything of the train. It was further held that where, by reason of obstructions, a train approaching a crossing cannot be seen by one driving till on the track, the fact that no gateman or warning signals are maintained at the crossing may be considered on the question of the railroad company's negligence. The court said in part:

"It seems too plain to require extended discussion that the trial judge did not err in refusing to direct a verdict for the defendant. He acted upon the well-settled rule that when the evidence is conflicting, and there are different inferences which may be drawn by different minds, the question of the contributory negligence of the injured party is one for the jury. If the jury believed the testimony on behalf of the plaintiff, the approaching train, because of the obstruction in the way, could not have been seen by him until his horses were practically upon the track, when it was too late to escape a collision, and he could only discover its approach by his sense of hearing. If his testimony was true, he used all his faculties diligently, and did everything that any prudent man would have been likely to do while crossing the track, unless he should have stopped his horses to listen more perfectly. His testimony may be incredible, and it may seem unaccountable that he did not hear the noise of the approaching train; but the jury was at liberty to credit his narrative, and to weigh among the probabilities in its favor the exertion of that impulse of self-preservation which, in the case of a sober and prudent man, is always to be presumed. In approaching a railroad crossing the injured party is not to be deemed guilty of contributory negligence because he did not exercise the greatest degree of diligence which he could have exercised, but only if he fails to exercise such care as a prudent man approaching such a place would. Whether he ought to stop in a given case is a question for the jury to decide, in view of the circumstances developed. The trial judge correctly stated the law in his instructions to the jury in these terms: 'When a traveler is approaching the track of a railroad, especially where there are obstructing buildings in the vicinity which interfere with his view, his duty is to proceed cautiously, to look, to listen, and, if the circumstances of the case require it, to stop, in order that he may listen more carefully before continuing his course.' In the recent case of Judson v. Railroad Co., 158 N. Y. 597, 53 N. E. Rep. 514, the court stated this to be the rule in the courts of nearly all the States in the Union. See, also, Improvement Co. v. Stead, 95 U. S. 16 1–168, 24 L. Ed. 403. It was for the jury to apply the in-

structions to the particular facts, and if they erred in finding that under the circumstances it was unnecessary for the plaintiff to stop in order to listen more attentively, because a prudent man would have supposed that the approaching train could be reasonably heard without doing so, the error is not one which it is within the province of an appellate court to correct."

HUSBAND AND WIFE — NECESSARIES—WIFE'S AGENCY.—In Hatch v. Leonard, 50 N. E. Rep. 270, it was held by the majority of the Court of Appeals of New York, that where plaintiff alleged that he sold certain goods to defendant, and that the request and promise to pay therefor were made by defendant's wife, who was his agent, and it appeared that defendant and his wife lived separate, plaintiff was not precluded from showing that the goods furnished were necessaries, on the ground that under his averment or agency such evidence would show a different cause of action. Three of the justices of the court dissented. The majority of the court through Parker, C. J., say:

"We have decided at this term of court that in an action to recover against an infant for goods sold it is not necessary to allege in the complaint that the articles furnished were necessaries. As a foundation for that decision, we called attention to the practice as it is obtained at common law in an action to recover for necessaries furnished an infant, which was that the declaration need contain only counts as in an action for debt, for board and lodging, or goods furnished. Goodman v. Alexander, 165 N. Y. 289, 59 N. E. Rep. 145. Precisely the same rule applies to a complaint in an action to recover for necessaries furnished to a wife. This complaint alleged that the plaintiff 'sold and delivered to defendant, at his request, certain merchandise, * * * to-wit, dry goods, being of the value of $335.85, which sum defendant promised to pay therefor to plaintiff as aforesaid. That no part of said sum has been paid.' It will be observed that the complaint alleges a sale of goods to defendant, and, if it contained no reference whatever to defendant's wife, it could not be questioned that plaintiff could prove under it that the goods were purchased by the defendant's wife for the use of herself and her children, and that they were necessaries, within the Goodman case, *supra*. But as the plaintiff alleged more in the complaint than was necessary, namely, that the purchase was made by the defendant's wife as defendant's agent, it is claimed that the plaintiff cannot recover except by proving an express agency, and that evidence tending to show facts from which the law will imply an agency is an attempt to prove a different cause of action. A brief examination will show that this position is not well taken. It should be noted that as to the matter of agency the complaint simply alleges that the wife was the defendant's agent. It does not allege that the defendant had expressly authorized her to make the purchases, but instead the draftsman was contented with alleging the fact of agency, and the allegations of the complaint are satisfied, therefore, by proving either an express agency or the facts from which the law implies an agency. An express agency was not proved; for it does not appear from the evidence that the defendant ever authorized his wife to make any of the purchases, nor does it show that they were living together as husband and wife, but instead the fact distinctly appears that they were living separate and apart from each other. Nevertheless it was possible that the plaintiff could have proved facts from which the law would imply an agency on the part of the wife to purchase these goods for her husband; for, notwithstanding the separation of husband and wife, the latter is bound to support the former, together with her children, in the absence of either an agreement or a decree of the court relieving him from that burden; and in such a case, if the wife purchases only those things which may be held to be necessaries, the law implies an agency on her part to make the purchase on the husband's credit. The authorities cited as holding otherwise, as I read them, are not at all in conflict with the views so far expressed, but, on the contrary, confirm them. The case of Montague v. Benedict, 3 Barn. & C. 631, so far as appears from the report, was an action for jewelry furnished to the wife of the defendant. The complaint was the ordinary one in *assumpsit* for goods sold and delivered. The plea was the general issue. There the plaintiff was nonsuited, it is true, but not until after the evidence on both sides had been introduced, and the real question involved was whether, under the evidence adduced, the goods were necessaries. In Clifford v. Laton, 3 Car. & P. 15, it appeared that the defendant's wife, who personally ordered the goods, was living apart from her husband. The complaint was for goods sold and delivered, and the plea was the general issue. No objection was made as to the sufficiency of the declaration. In Baker v. Barney, 8 Johns. 72, the defendant had parted from his wife by consent, but, nevertheless, was held liable in an action for goods sold and delivered, being necessaries sold to the wife. In Cromwell v. Benjamin, 41 Barb. 558, the action was brought to recover the value of a bill of goods furnished by the plaintiff to the defendant's wife and children. It was there said: 'If the liability of the husband for necessaries furnished to his wife rested solely on the ground of an agency in fact, express or implied, it would be somewhat difficult to sustain the report of the referee in this case. * * * But the husband may be liable for necessaries furnished to the wife in certain cases, though the existence of an agency or assent, express or implied in fact, is wholly disproved by the evidence, and this upon the ground of an agency implied in law, though there can be none presumed in fact.' The plaintiff, claiming that the facts existed in this

case from which the law would imply an agency on the part of the wife to purchase the goods in question, attempted to prove such facts, but they were excluded by the court on the ground that they were not admissible under the pleadings, and the exceptions taken to such rulings entitle the plaintiff to a reversal of the judgment. The dissenting judges say: 'I do not see how Goodman v. Alexander is controlling. That was an action against the infant to whom the goods were sold. The cause of action stated in this complaint was one depending upon the allegation of the agency of the defendant's wife. That was the issuable fact, and, if it could be established by evidence, the allegation was sufficient, within the requirement of the rule of pleading that the facts are to be stated which call into operation the rules of law imposing a duty upon the defendant and the consequent liability for his default. No attempt, however, was made upon the trial to establish such an agency. No proof was excluded which tended to show that the defendant's wife was, expressly or impliedly, authorized to contract for him. The evidence which was excluded by the trial judge was offered to show that the articles were necessary to her support and comfort or to that of the children, with the view, presumably, of sustaining the right of the plaintiff to recover for supplying what the defendant was in duty bound to supply. That was quite a different theory of liability, and one which was not suggested by the complaint. If the plaintiff's right of recovery rested upon such a ground, then it was incumbent upon him to state in his complaint the facts, in order that the defendant might be apprised of what he must meet upon the trial. To seek to charge a defendant with a liability for the acts of his agent is one thing, and to seek to charge him with a liability arising out of his non-fulfillment of some social duty or obligation implied by the law is another thing. They constitute different causes of action, and necessitate different methods of proof. If, by resort to legal fictions, the wife may be regarded as her husband's agent, and invested with an implied authority, as such, to bind him in contracting for necessaries which he failed to supply, still, in such a case, the rules of pleading would not, in my judgment, be satisfied by stating the mere legal conclusion, without the facts from which it is asserted. But as that fiction of agency essentially depends upon the cohabitation or the living together of the parties, it was at once destroyed by the statement of the plaintiff's counsel, upon the opening of the trial, that they had been separated for several years,—a fact subsequently established by the plaintiff's proof. Therefore the case was one where the plaintiff could not prove the allegation on an agency, and in lieu of that sought to recover upon another ground, namely, the liability of a husband for necessaries supplied to his wife. Whatever presumption of authority in the wife is to be inferred from cohabitation, her separation from her husband necessarily negatives that presumption. While they live together, when she purchases necessaries for herself or family the law will presume that she had the authority of her husband for doing it, and she is privileged to pledge the credit of her husband. It is the cohabitation or living together of the parties in their marital relation upon which the law founds the duty of the husband, and, in the case of his neglect to perform it, sustains the right of another to recover for supplying necessaries to his wife. The principle is then applicable of an implied authority in her to bind her husband. See Montague v. Benedict, 3 Barn. & C. 631; Blowers v. Sturtevant, 4 Denio, 46; Cromwell v. Benjamin, 41 Barb. 558; Eames v. Sweetser, 101 Mass. 78; Reeve, Dom. Rel. (4th Ed.), p. 114 *et seq.* Whatever the implied authority of the wife to bind her husband in the purchasing of such necessaries as are reasonable, in view of her social *status* or condition, the separation or non-cohabitation of the parties essentially changes the legal situation. If the separation is not due to her misconduct, the husband will continue to be bound to furnish her with those things which are reasonably necessary for her or their children, and, if he fails in that respect, she will be entitled to a general credit to that extent; but the theory or implication of any agency in her is negatived by the fact of the separation. If she is not expressly authorized, as any other person might be, to act as his agent, or if her contracts are not recognized and ratified by him, his liability must rest upon a different ground. It must rest upon the duty which the laws has always recognized as being imposed upon him, by virtue of their marital relation, to supply her with what she needs in her condition of life. His failure to perform that which law and duty require of him confers upon her authority to act, to the extent that it may be necessary to provide herself and her family with the reasonable necessaries of life. In applying these principles to the case at bar, we see, in view of the separation of the defendant and his wife, that the presumption of any agency in her to make him liable upon her contracts for necessaries was negatived. She was in no sense his agent. If he was liable at all, it was because of a state of facts which it was incumbent upon the plaintiff to allege. It is the office of the complaint to state concisely the facts constituting the plaintiff's cause of action, in order that the defendant may be prepared for the trial of the issue tendered. I think the trial judge committed no error in refusing to permit the plaintiff to amend his complaint and in nonsuiting him for failure of proof."

CRIMINAL LAW—ABORTION—INDICTMENT.—One of the points decided by the Court of Appeals of Maryland, in Worthington v. State, is that where there was no statute charging the common-law character of the crime of death by

abortion, a demurrer to an indictment on the ground that it charged death as the result of an abortion but charged the defendant with the crime of manslaughter instead of murder was properly overruled, since causing death by attempting abortion is only manslaughter, at common-law, unless the attempt is made in a way that endangers the mother's life. The court on this point, says:

"The proposition upon which the demurrer is based is that the death of a woman, resulting from a criminal abortion upon her, is, at common law, murder, and the indictment, if it can at all be regarded as an indictment for homicide, is defective because it charges death as the result of the abortion, but charges the defendant with the crime of manslaughter instead of murder. It is contended that this defect is obvious, from the fact that murder and manslaughter are different crimes, and not different degrees of the same crime, and the further fact that there is no statute in this State reducing the character of the crime, when the death of the mother is caused by a criminal abortion, from murder to manslaughter. The principal reliance for this contention is the case of State v. Moore, 25 Iowa, 137, in which the opinion of the court was delivered by Judge Dillon. The defendant was indicted for murder in the second degree, by abortion. The defendant demurred to the indictment on the ground that the offense charged was not murder, because it had been held in Iowa, that no act, though indictable at common law, could be punished as a crime unless the act was declared criminal by statute; and it was argued that as the statute defining and punishing murder was passed in 1851, and the statute making the procuring of an abortion unlawful was not passed until 1858, the latter act, which says nothing about murder, could not make that murder which was not so before. The same question was also raised by a request to the court to instruct the jury that they might convict of manslaughter, which instruction was refused. The court held and, as we think, properly, that the act of 1851, being unrepealed, continued to speak in 1858, and had the same force and effect as if it had been passed concurrently with or subsequent to the act of 1858, and therefore overruled the demurrer. But the question still remains whether, under that indictment, a conviction for manslaughter could be had. Upon that question, the court cited the passage from Lord Hale (1 P. C. 429, 430) relied on here, as follows: 'If a woman be with child, and anyone gives her a potion to destroy that child within her, and she takes it, and it works so strongly that it kills her, this is murder, for it was not given to cure her of a disease, but unlawfully to destroy her child within her, and therefore he that gives a potion to this end must take the hazard, and if it kill the mother it is murder.' The court also cited to the same effect Com., v. Parker, 9 Metc. (Mass.), 263, per Shaw, C. J., and in disposing of the demurrer said: 'The crime, we have seen, was, at common law, murder, and under our statute is murder in the second degree. Under the charge and under the evidence, the defendant was guilty of murder in the second degree or of nothing, and hence the court did not err in refusing to say to the jury that they might convict the defendant of manslaughter.' Too great respect cannot be paid to the opinions of these eminent judges, but it is obvious that there must be some limitations to the doctrines thus alleged to be laid down by Lord Hale, and we are unwilling to adopt it as a hard and fast rule, even though fortified by Judge Shaw and Judge Dillon; and, as the State's attorney has pointed out, a careful examination of the chapter from which the above citation was taken will show 'murder' was not necessarily used in its technical sense, but as equivalent to homicide, embracing both murder and manslaughter. But, whatever may have been the severity of the earlier common law, the proposition is too broadly stated,—that death resulting from a criminal abortion has always been murder at common law. The crime of abortion is a misdemeanor, only, at common law; and our statute, while broadening the scope of the common law, and increasing the punishment, still leaves the crime a misdemeanor. For this reason, as stated in Clark, Cr. Law, p. 161, 'causing the mother's death in attempting an abortion is only manslaughter at common law, if the attempt is not made in a way that endangers the mother's life. In the latter case it is murder.' It is only in jurisdictions where abortion is raised by statute to the grade of felony that causing the death of the mother is necessarily murder. *Id.* pp. 161, 174. Mr. Wharton says, in his Criminal Law (section 325), that where there is no intent to kill or to inflict grievous injury, and no likelihood of such result, the offense is but manslaughter; and in section 318 of his work on Homicide he says: 'Whether the offense is murder or manslaughter depends largely on the intent as appearing on the whole case. If the intent was to kill or grievously injure her, the offense is murder. It is manslaughter if the intent was only to produce the miscarriage, the agency not being from which death or grievous injury would be likely to result.' It is common knowledge that death is not now the usual, nor, indeed, the always probable consequence of an abortion. The death of the mother, doubtless, more frequently resulted in the days of rude surgery, when the character and properties of powerful drugs were but little known, and the control over their application more limited. But, in these days of advanced surgery and marvelous medical science and skill, operations are performed and powerful drugs administered by skillful and careful men without danger to the life of the patient. Indeed, it is this comparative immunity from danger to the woman which has doubtless led to the great increase of the crime, to the establishment of a

class of educated professional abortionists, and to the enactment of the severe statutes almost everywhere found to prevent and punish this offense. The woman takes her life in her own hands when she submits to an abortion, be she wife or maid, but her death is no necessary element in the procuring of an abortion; and the application of the harsh rule here contended for would have no effect in the repression of that abhorrent crime, which can only be efficiently dealt with by severity in the enactment and administration of the law punishing the attempt upon the life of the unborn child. In the late case of People v. Com., 87 Ky. 492, 9 S. W. Rep. 509, 810, the law upon this subject is well reviewed; and the doctrine announced in Clark and Wharton, as we have stated it, is approved and adopted. In Reg. v. Gaylor, 7 Cox, Cr. Cas. 253, decided in 1857, the indictment was for manslaughter by abortion, and the prisoner was convicted. The evidence showed that the prisoner was clearly guilty of being accessory before the fact to the woman taking the drug with intent to procure an abortion, and the judge reserved the case for the opinion of the court of criminal appeal. It was heard before Pollock, C. B., Bramwell and Watson, BB., and Erle and Willes, JJ. Erle J., before whom the case was tried, said: 'This would, in my opinion, be murder, if she died in consequence of taking that drug. But the grand jury found that it was manslaughter. If a man is indicted for manslaughter, and it turns out to be murder, he may be found guilty of manslaughter. In this case I thought he was guilty of murder by administering the drug, and might therefore be convicted of manslaughter.' The judges affirmed the conviction, but without giving their reasons for doing so. If the present indictment had been for murder as it contended it should have been, there can be no doubt a conviction of manslaughter would have been good. State v. Flannigan, 6 Md. 167; Davis v. State, 39 Md. 355. So that the defendant is in the singular position of complaining of an indictment because it does not subject him to conviction for a graver offense than that with which he is charged. But Mr. Wharton says in section 390 of his Criminal Law. 'Where there is no intent either to take the life of the mother or to do her grievous bodily injury, the proper course is to indict separately for the manslaughter of the mother and for the perpetration of the abortion.' Courts in this State constantly instruct grand juries that they ought not to indict if upon the evidence produced by the State they would not convict if sitting as petit jurors; and, for the same reason, if upon the evidence of the State they would not convict of the higher offense if sitting as petit jurors, they would be justified, with the advice of the State's attorney, in refusing to subject the accused to the danger of conviction upon a charge of which the accusing body would not, upon that evidence, convict him. See Yundt v. People, 65 Ill. 372. We can discover no defect in this indictment which a demurrer could reach, and we think there was no error in overruling it. The defendant also contends that the indictment does not charge any form of homicide, but is for the statutory offense of abortion, and that for this reaon no dying declaration can be received. But this contention cannot be sustained. It is certain that dying declarations can only be received where the death of the deceased is the subject of the charge, and the circumstance of the death the subject of the declaration. 1 Greenl. Ev. § 156; Whart. Cr. Ev. § 276. But in prosecutions for abortion the death of the woman is no part of the facts which go to constitute the crime. That is complete, with the death or without it. It is not a constituent element of the offense. Railing v. Com., 110 Pa. St. 100, 1 Atl. Rep. 314. A comparison of this indictment with our statute defining and punishing abortion must make it evident that no competent pleader could have so framed an indictment under that statute. It makes no pretense of conforming to the fundamental rule of safety. It follows the language of the statute. No interference to sustain the defendant's contention can be drawn from the use of the words 'without legal jurisdiction,' because the defense that the act was necessary to save the life of the mother is equally a defense to an indictment for the murder and manslaughter of the mother, and to an indictment under the statute for an abortion. 1 Whart. Cr. Law, § 595. The *corpus delicti* of the offense of abortion is the destruction of the unborn infant, and the form given by Bish. Dir. & Forms, § 138, requires an averment that, in consequence of the means used, 'the life of the said child was then and there destroyed, and it was then and there prematurely born.' No averment of this character is to be found in this indictment, which closely follows the form given by *Id.* § 528, for general use where the *corpus delicti* is the death of the mother. In People v. Olmstead, 30 Mich. 439, where the indictment was manslaughter by abortion, the court said: 'Manslaughter at common law very generally consisted of acts of violence of such a nature that indictments for murder and manslaughter were interchangeable by the omission or retention of the allegation of malice and of the technical names of the offenses.' The learned judge before whom this case was tried, in the ruling which counsel reduced to writing and incorporated in the record, has stated the law as clearly as possible, in these words: 'This is not an indictment for abortion. It is an indictment which charges manslaughter, and the facts of the abortion are simply alleged there as going to show what caused the death, just as if it had been alleged that the means of death were by shooting her with a pistol.' There can, therefore, be no doubt that under such an incident dying declarations are receivable."

THE CONTRACT WHICH THE LAW CREATES AFTER A BREACH, IMPERFECT PERFORMANCE, OR ABANDONMENT.

If never, after a contract has been broken, imperfectly performed, or abandoned, any legal adjustment of the rights of the parties were permitted, except under the contract itself, great injustice would frequently follow. One whose property or services had gone, either at the time of or after the execution of the contract, to enrich another and impoverish himself, might be without a remedy, however small the blame on his side or merit on the other. To avoid such a condition of things, the law, in proper cases, creates a contract to supplement or take the place of the one which the parties had made, and therein it proceeds upon the principle that he who has conferred upon another a benefit not meant to be gratuitous is entitled to be compensated therefor, except where some other principle interposes with superior force. Whenever a contract has been receded from, performed so imperfectly that a suit upon it cannot be maintained, or broken beyond repair, if there remains in the hands of one of the parties any value which was given to him by the other at its inception, or in the course of any doing under it, over and above what he may be entitled to retain because of the fault of the other relating thereto, he should return it to the other, failing which the other may recover it of him;[1] unless the action for its recovery discloses a wrong in the plaintiff in the matter complained of to a degree precluding him from a standing in court,[2] or unless prohibited by reason of the original contract having been fraudulent or unlawful, or unless the bestowal of the beneficial thing was contrary to the recipient's will, or some positive rule of law or procedure forbids.

Obviously a void contract is the same as none, and a voidable contract may be so treated.[3] Therefore, in either case, there is ample room for the law to create what the parties have omitted. So that, to illustrate, if an express agreement fails by reason of the illegality of the consideration, one who in reliance upon such agreement has conferred benefits upon the other by some lawful thing may recover pay therefor on a contract which the law will create.[4] Or, if one furnish necessaries to a minor, or an insane person, on terms agreed, yet not binding by reason of the disability of the latter, the party may recover of the one in law liable to pay, not what the apparent contract calls for, though it may be looked to, but what the necessaries were reasonably worth.[5] One may be entitled to recover for a benefit which, in the course of an ineffectual performance of his contract, he has conferred on the other party, who has accepted and retains it—the contract itself being by the former broken, whether in the particular of time or in any other.[6] But equity regards time somewhat differently. Not exclusively, but most frequently, the question arises on a bill for the specific performance of a contract. Then, should the complainant have committed a lapse as to time, if time was not what is termed of the essence of the contract, if he acted in good faith, and if his cause is meritorious, he will have the relief prayed.[7] But if the parties regard time as of the essence—as if they have made it such by the form of their contracting[8]—or if the nature of the subject-matter renders it such,[9] or if the justice of the individual case requires, the court will treat it as of the essence, and hold the parties to the conse-

[1] Hollinsead v. Mactier, 13 Wend. 275; Merrill v. Ithaca, etc. R. R., 16 Wend. 586; Ladue v. Seymour, 24 Wend. 60; Dermott v. Jones, 2 Wall. 1; Hayward v. Leonard, 7 Pick. 181; Thompson v. Purcell, 10 Allen, 426; Whipple v. Dow, 2 Mass. 415; Pratt v. Law, 9 Cranch, 456; Thomas v. Ellis, 4 Ala. 108; Lomax v. Bailey, 7 Blackf. 599.

[2] Dula v. Cowles, 2 Jones (N. Car.), 454; Niblett v. Herring, 4 Jones (N. Car.), 262; Malbon v. Birney, 11 Wis. 107; Dermott v. Jones, 2 Wall. 1; Brown v. Kimball, 12 Vt. 617.

[3] Gist v. Smith, 78 Ky. 367.

[4] Thurston v. Percival, 1 Pick. 415.

[5] Hyer v. Hyatt, 3 Cranch (C. C.), 276; Parsons v. Keys, 43 Tex. 557.

[6] Barnwell v. Kempton, 22 Kan. 314.

[7] Hill v. Fisher, 34 Me. 142; Brashier v. Gratz, 6 Wheat. 528; Hild v. Linne, 45 Tex. 476; Hall v. Delaplaine, 5 Wis. 206. See Thurston v. Arnold, 43 Iowa, 43; Brunfield v. Palmer, 7 Blackf. 227; Pedrick v. Post, 85 Ind. 255.

[8] Taylor v. Longworth, 14 Pet. 172; Hicks v. Aylsworth, 13 R. I. 562. See, Thurston v. Arnold, 43 Iowa, 43, holding that this fact may be shown by parol evidence.

[9] Griffin v. City Bank, 58 Ga. 584; Saltonsall v. Little, 9 Norris (Pa.), 422.

quences.[10] Where rescinding is permissible, and it has been lawfully done by the party entitled to rescind—or unlawfully by the other party—the one entitled may recover back the consideration, or whatever else he has paid on the contract, including compensation for work done, goods sold, and the like prior to the rescission.[11]

But one abandoning his contract without justification, or for whose fault the other party has lawfully rescinded it, stands in a different position.[12] The prevailing rule is that he can recover nothing, because he is himself in the wrong. Yet this rule may be overcome by the equities of the particular case, in exceptional circumstances.[13] An infant rescinding an executed contract should in general restore what he has received under it.[14] And after the rescission by him of any contract executory or executed, if there is in his possession anything of value which he received from the other party as a consideration for it, such party take the thing, or recover it by process of law.[15] But the right of rescission by the infant is superior to the right of the adult to have back the thing; so that, if the former has parted with it and has it not he may still rescind, though he does not return either the thing or its equivalent.[16] The authorities are in a degree conflicting as to the effect of the ignorance of one party of the insanity of the other contracting party. In England, the prevailing doctrine is, that whenever the party contracting with the insane person proceeded honestly and fairly, and without either actual knowledge of his insanity or anything calculated to excite suspicion of it, and the contract is equitable and just, and is on one or both sides executed, it will be binding on the insane person unless, on its rescission, the parties can be placed *in statu quo*. But this being collateral to the question now under discussion it will suffice to say, in a general way, that this seems to be the prevailing rule laid down by most of our courts.[17] When persons are under an equal obligation to do a thing not violative of law, and one of them does it, if there is no circumstance rendering the equities between them otherwise than equal, and no express agreement, the doer is entitled, under a promise created by the law, to recover such compensation of his several companions as shall leave the burden equal.[18] This is the familiar rule as between sureties and other joint promisors, where one has discharged more than his proportion of a debt;[19] and it is held that this rule applies also in other like cases.[20] But since even an express contract founded on a consideration immoral, illegal or contrary to public policy is void, the law will not create a contract between its violators; as if, for instance, an execution on a judgment against several persons for a tort is satisfied out of the moneys of one, he cannot compel contribution from his co defendant.[21] In the cases just cited Lord Denman, C. J., observed that "the general rule is that between wrongdoers there is neither indemnity nor contribution, the exception is where the

[10] Shaw v. Turnpike, 2 Pa. 454; Usher v. Livermore, 2 Iowa, 117; Young v. Daniels, 2 Iowa, 126; Kemp v. Humphreys, 13 Ill. 573; Stow v. Russell. 36 Ill. 18; Potter v. Tuttle, 22 Conn. 512; Kirby v. Harrison, 2 Ohio St. 326.

[11] Randlett v. Herren, 20 N. H. 102; Brown v. Mahaurin, 39 N. H. 156; Drew v. Claggett, 39 N. H. 431; Kimball v. Cunningham, 4 Mass. 502; Sherburne v. Fuller, 5 Mass. 133; Fitzgerald v. Allen, 128 Mass. 232; Nash v. Towne, 5 Wall. 689; Weatherly v. Higgins, 6 Ind. 73; Hickock v. Hoyt, 33 Conn. 553; Martin v. Eames, 26 Vt. 476; Chamberlin v. Scott, 33 Vt. 80; Bayliss v. Pricture, 42 Wis. 651; Wilkie v. Womble, 90 N. Car. 254; Warren v. Tyler, 51 Ill. 15.

[12] Plummer v. Bucknam, 55 Me. 105; Olmstead v. Beale, 19 Pick. 528; Faxon v. Mansfield, 2 Mass. 147; Clark v. School Dist., 29 Vt. 217; Larkin v. Buck, 11 Ohio St. 561; Robinson v. Raynor, 28 N. Y. 494.

[13] For a discussion of this question see, Britton v. Turner, 6 N. H. 481; Carroll v. Welch, 26 Tex. 147; Hartwell v. Jewett, 9 N. H. 249; Pixler v. Nichols, 8 Iowa, 106; Byerlee v. Mendel, 39 Iowa, 382; Patrick v. Putnam, 27 Vt. 759; Cahill v. Patterson, 30 Vt. 592; Goodwin v. Merrill, 13 Wis. 658; Lomax v. Bailey, 7 Blackf. 599.

[14] Strain v. Wright, 7 Ga. 568; Kitchen v. Lee, 11 Paige, 107; Womack v. Womack, 8 Tex. 397; Stuart v. Baker, 17 Tex. 417; Pursley v. Hays, 17 Iowa, 310.

[15] Badger v. Phinney, 15 Mass. 359; Skinner v. Maxwell, 66 N. Car. 45; Carpenter v. Carpenter, 45 Ind. 142.

[16] Manning v. Johnson, 26 Ala. 446; Eureka Co. v. Edwards, 71 Ala. 248; Chandler v. Simmons, 97 Mass. 508; Green v. Green, 69 N. Y. 553; Brandon v. Brown, 106 Ill. 519; Dill v. Bowen, 54 Ind. 204.

[17] See Wieder v. Weakley, 34 Ind. 181; N. W. Mut. F. Ins. Co. v. Blankenship, 94 Ind. 535; Copenrath v. Kienley, 83 Ind. 18; Riggan v. Green, 80 N. Car. 236; Crawford v. Scovell, 13 Norris (Pa.), 48.

[18] Fowler v. Donovan, 79 Ill. 310.

[19] Wells v. Miller, 66 N. Y. 255; Robertson v. Deatherage, 82 Ill. 511; Chipman v. Morrill, 20 Cal. 130; Snyder v. Kirtley, 35 Mo. 423.

[20] Fowler v. Donovan, 79 Ill. 310

[21] Betts v. Gibbins, 2 Am. & Eng. Enc. of Law, 57.

act is not clearly illegal in itself." This exception does not prevail, therefore contribution may be enforced, against a party not within its reason; that is, not knowing the facts which render him a wrongdoer, so deemed such only by implication of law.[22] In Bishop's Criminal Law, §§ 301, 303*a*, and the note to the latter section, it is said: "The doctrine seems to be, that to take away the equitable right of enforcing contribution, there must be an evil intent similar to the element of intent in the criminal law, where an ignorance of fact of a sort to free one from culpability will excuse what otherwise would be punishable." There is no authority for deeming that the law will under any circumstances treat that as a contract which in fact was a tort; and both reason and the decisions exclude such an assumption.[23] This rule is confirmed by an apparent exception, namely, that, in certain cases, principally where the tort-feasor has converted into money that which he wrongfully took, the person injured may waive the tort and sue as on a contract created by law.[24] It is well settled that what amounts to an abandonment of a contract is a matter of law, and the court should instruct the jury as to the legal effect of the facts which they might find, bearing upon the question, and not leave it to them to say, without such instruction, whether a contract has been abandoned or not.[25] In other words, where an act, or certain specific acts are relied on to show an abandonment of a contract by one of the parties to it, it is proper for the court to declare whether such act or acts constitute an abandonment.[26]

To constitute an abandonment of a right secured, there must be a clear, unequivocal, and decisive act of the party—an act done which shows a determination in the individual not to have a benefit which is designed for him.[27] A mere declaration made by one bound to perform a future act, before the time for doing it, that he will not do it, is of itself no breach of contract; but if this declaration is not withdrawn when the time arrives for the act to be done, this is a sufficient excuse for the default of the other party.[28] Before a party to a contract may sue for a breach before the arrival of the time designated for performance, on the ground that the defendant has refused to perform, he is bound to show, unless the refusal has been acted on, that such refusal was positive and was persisted in down to the time set for performance, or that the defendant has rendered himself unable to perform the contract on his part.[29] If on the day fixed for the contract to be performed one of the parties refuses to perform unless conditions unreasonable are acceded to, there is a breach which the party cannot sue by changing his mind four hours afterwards and offering to perform.[30]

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[22] Moore v. Appleton, 26 Ala. 633; Acheson v. Miller, 2 Ohio St. 203.

[23] Fuller v. Duren, 36 Ala. 73; McCoun v. N. Y. Cent. R. R., 50 N. Y. 176; Jones v. Hoar, 5 Pick. 285; Carson River, etc. Co. v. Bassett, 2 Nev. 249; Balch v. Patten, 45 Me. 41.

[24] Gilmore v. Wilbur, 12 Pick. 120; Jones v. Baird, 7 Jones (N.Car.), 152; Bethlehem v. Perseverance Fire Co., 13 Smith (Pa.), 445.

[25] Henry v. Bassett, 75 Mo. 90; White v. Wright, 16 Mo. App. 551.

[26] Chouteau v. Jupiter Iron Works, 83 Mo. 73.

[27] Breedlove v. Stump, 3 Yerg. (Tenn.) 257, and cited with approval in Dawson v. Daniel, 2 Flipp. (U. S.) 309.

[28] McPherson v. Walker, 40 Ill. 371; Carstens v. McDonald, 38 Neb. 858.

[29] Gray v. Green, 9 Hun (N. Y.), 334.

[30] Bell v. Hoffman, 92 N. Car. 273.

CRIMINAL LAW — LARCENY — EVIDENCE — DECLARATIONS OF ACCUSED — POSSESSION OF STOLEN GOODS.

STATE v. GILLESPIE.

Supreme Court of Kansas, Feb. 9, 1901.

1. The declarations of a person found in the possession of stolen goods as to how he came by them, made by him at once upon their being discovered in his keeping, are of the *res gestæ*, because they are parts of the fact of either rightful or wrongful possession, and may be given in evidence upon a trial for the larceny of the goods, even though self-serving in character.

2. The mere possession of goods recently stolen upon the occasion of a burglary, alone and of itself, is not, as matter of law, evidence tending to show the possessor guilty of the larceny; nor is such possession, in connection with other circumstances, sufficient, as matter of law, to raise a presumption of guilt of either larceny or burglary; but such possession, in order to constitute evidence tending to show guilt of the larceny, or to be sufficient, in connection with other criminating circumstances, to raise a presumption of guilt of the burglary, must be unaccompanied by any reasonable explanation by

the accused, or arising out of the evidence in the case, as to how he came by the goods.

DOSTER, C. J.: This is an appeal from a judgment of conviction of the offenses of burglary and larceny, concurrently committed. The store of one C. J. Gram, in Halstead, Harvey county, was broken into in the nighttime and some articles of fruit and confectionery stolen. Suspicion of the crime fell upon the appellant, Taylor Gillespie, a boy aged about seventeen, who, with two sisters, resided on the outskirts of the town. A few mornings after the commission of the burglary, Gram, the store proprietor, and one Philbrick, a constable, called at the appellant's house to search for the stolen property. After an explanation by these men of the object of their visit, the boy left, and remained away about an hour, during which time some of the goods in question were found in the house. When he returned and learned that the goods had been found, he explained that one Ike Thompson had brought them to him and left them in his keeping, or, rather, to state the fact more accurately, he testified in his defense on the trial that Thompson had brought them to his house and left them in his charge; and he offered to testify, and likewise to prove by Gram and Philbrick, that he so stated to them immediately on his return to his house, and on being informed of the discovery there of the goods. This offered evidence of the explanation given by him was rejected by the court, and its rejection has been assigned as error. We are quite well assured that it was error. The general rule is that declarations made by a party concomitantly with the performance of an act by him, and of a nature to explain and characterize it, constitute a part of the act itself. The act and the accompanying declaration together constitute the *res gestæ*, and are both admissible in evidence. This rule is too familiar to require the citation of authorities in order to the understanding or enforcement of it. It may be remarked, however, by way of illustration of its application to particular cases, that it is not limited to instances of self-deserving declarations, but extends as well to declarations self-deserving in character. "It makes no difference, so far as the admissibility of the declaration is concerned, whether it be in favor of or against the party making it. If the act was one of alleged criminality, and the accompanying declaration tends to show it to be innocent, it is equally admissible as when the tendency is to show the criminality of the act, and it may be given in evidence by the defendant as well as by the State." Hamilton v. State, 36 Ind. 280. In further illustration of the rule it may be also remarked that it is not limited to declarations accompanying the performance of acts by a party, but applies as well to declarations explanatory of existing facts with which a party stands in immediate personal relation. Declarations *res gestæ* are not merely declarations accompanying acts performed, but they are also declarations concomitant with present facts. The test of their admissibility is instinctiveness of utterance. If they appear to be the spontaneous, unpremeditated speech of the party in immediate casual relation to the thing in question, they are admissible, whether that thing be an act concurrently performed or fact concurrently existing, or whether it be inculpatory or exculpatory in character or import. Declarations of this kind explanatory of the possession of stolen property fall entirely within the rule, and their admissibility has been fully authorized by the courts and text writers. Mr. Bishop, in his Criminal Procedure (Vol. 2, § 746), says: "The discovery of the stolen goods in the possession of the defendant being a fact in the case the doctrine of the *res gestæ* teaches that what he said in connection with this fact—that is, with the discovery—may in general be admitted in evidence on either side, especially where at the time of such discovery he is directly or by implication charged with the theft. For example, his explantion of how he came by the goods, and the like, may be testified to as well in his behalf as against him. And if such explanation appears to the jury reasonable, and it is not shown by the prosecutor to be false, its weight in the scale for him will be very considerable; but if it appears unreasonable, and especially if it is shown to be false, it will bear against him heavily." Some of the cases most clearly in point are People v. Dowling, 84 N. Y. 478; Henderson v. State, 70 Ala. 23; Mitchell v. Territory, 7 Okl. 527, 54 Pac. Rep. 782. It is not improbable that the court below ruled against the introduction of the offered testimony because the explanation made by the defendant was not given upon the instant of the first imputation against him of guilty possession of the goods. Some of the testimony might furnish a justification for this view, but other parts of it do not. It was not so stated by the court as the ground of the ruling made. It was not pressed upon us by the counsel for the State, but was only casually suggested by them, and therefore we have not critically examined all of the evidence to see whether such may have not been the reason for the court's decision. In fact, it would seem difficult to determine the relation, in point of time and other circumstances, between an accused person's knowledge of a criminating fact and his explanation of it, when the privilege was denied him of stating what his explanation was, and at the time he made it, with relation to his knowledge of the exculpatory circumstance.

Upon the subject of the presumption arising from the possession of recently stolen property the court instructed as follows: "The possession of recently stolen goods taken on the occasion of a burglary is evidence tending to show the guilt of the possessor, and may, when taken in connection with other criminating circumstances, raise a presumption of guilt sufficient to warrant a conviction of both burglary and larceny." In

State v. Powell, 61 Kan. 81, 58 Pac. Rep. 968, the question of the presumption arising from the possession of recently stolen goods taken on the occasion of a burglary was given consideration. In that case the court below had instructed that the unexplained possession of recently stolen property was *prima facie* evidence of the guilt of the larceny, and when burglary was charged in connection with the larceny, and the larceny could not have been effected without the commission of the burglary, the possession of the stolen property was also *prima facie* evidence of the burglary. This instruction was held to be erroneous because of the failure to include "other incriminating circumstances" than the possession of the stolen property as necessary to raise the presumption of guilt of burglary. As to the conditions under which a presumption of guilt of burglary as well as larceny arises, the instruction of the court in this case omitted the statement of one of the essential facts justifying the presumption. That was the lack of explanation of the defendant's possession of the property. The court instructed that possession of recently stolen property taken on the occasion of a burglary was evidence tending to show the guilt of the possessor, and that, of course, meant his guilt of both burglary and larceny, because they were both charged in the information, and were both the subjects of investigation; and the court also instructed that such possession, in connection with other criminating circumstances, might be sufficient to raise a presumption of guilt of both burglary and larceny. Now, the unexplained possession of property recently stolen from a burglarized house may be evidence tending to show guilt of both offenses; but it cannot be that the mere possession of recently stolen property is, as matter of law, evidence tending to show the possessor to be guilty of the larceny, because, if such be the case, it might tend so strongly to show guilt as to alone justify conviction. Nor do we think that, as matter of law, the mere possession of goods recently stolen on the occasion of a burglary may be sufficient, even in connection with other criminating circumstances, to raise a presumption of guilt of the burglary. The difference in strength and cogency between evidence tending to show guilt and evidence sufficient to raise a presumption of guilt is not great enough, if it exists at all, to justify the drawing of distinctions between the rules applicable to the two states of moral conviction they generate. As just remarked, evidence tending to show guilt may tend so strongly to show it as to raise a presumption of guilt; and a presumption of guilt, if not rebutted, is sufficient to convict of guilt. It is the unexplained possession of recently stolen goods that tends to show guilt or raises a presumption of guilt of the larceny, and it is the unexplained possession of recently stolen goods on the occasion of a burglary that tends to show guilt or raises a presumption of guilt of the burglary. In the case of State v. Powell, *supra*, the instruction held to be erroneous was not criticised because lack of explanation by the possessor of the stolen goods was not included among the conditions giving rise to the presumption of guilt. In fact, in that case lack of explanation was distinctly included among the elements of the presumption, so far as the larceny was concerned. In that case the instruction was held to be erroneous because the court had ruled that the possession of property recently stolen on the occasion of a burglary was sufficient, without other criminating circumstances, to raise the presumption of the guilt of burglary. The instruction might have been criticised because of the failure to include lack of explanation as one of the necessary additional criminating circumstances, but the question in the case was not what particular circumstances should accompany the possession of the goods in order to raise the presumption, but it was whether mere possession, without any other circumstance, was sufficient; hence it did not become necessary to consider lack of explanation by the possessor of the goods as a condition giving rise to the presumption. However, it is quite apparent that the opinion in that case proceeded upon the assumption that the law required lack of explanation of the possession of stolen goods taken from a burglarized house to constitute an element necessary to show guilt or to raise a presumption of guilt of both offenses, because, among other things, it was remarked, "It has been frequently held in this State that such possession unexplained, is *prima facie* evidence of larceny;" and again, "We do not feel warranted in still further extending the presumption that the evidence is of itself sufficient, if unexplained, to warrant a conviction for burglary." We think the rule stated by us obtains generally in the other States. In Orr v. State, 107 Ala. 35, 18 South. Rep. 142, the court says: "Whenever there is evidence tending to explain the possession, it is error to charge the jury that recent possession of stolen property is *prima facie* evidence of guilt, without the qualification 'unexplained.' The words 'may be' should be used in the place of the word 'is.' It is the 'unexplained' possession of stolen property that authorizes the inference of guilt. Whether the explanation offered is credible or satisfactory is a question for the jury." See, to same effect, Blaker v. State, 130 Ind. 203, 29 N. E. Rep. 1077; Robb v. State, 35 Neb. 285, 53 N. W. Rep. 124. Other claims of error are made, but we do not consider them well founded; but for the errors above pointed out the judgment of the court below is reversed, and a new trial ordered. All the justices concurring.

NOTE.—*How Far the Recent Possession of Stolen Property Will Raise a Presumption of Guilt of Either Larceny or Burglary.*—On a first casual reading of the opinion rendered by the court in the principal case the lay reader will probably immediately jump to the conclusion that the court was juggling the law or trifling with technicalities. On first

appearance it would indeed seem that for a man to be discovered, immediately after the commission of an act of burglary or larceny, in possession of stolen property, would raise an almost conclusive presumption of his guilt. The law, however, safeguarding the liberty of the accused until conviction, does not jump to conclusive presumptions from circumstantial evidence, and makes certain provisions for the introduction of such evidence and for fixing its weight and value. In the first place it may be stated without controversy that the mere possession of stolen property, whether recent or not, or whether sustained by corroborating circumstances or not, is always admissible in evidence in support of an indictment for either larceny or burglary, but will of itself not justify a conviction or give rise to any presumption of guilt against the accused, the jury being expected to consider it along with other evidence and to be the sole judges of its weight or value. People v. Titherington, 59 Cal. 598; Johnson v. State, 47 Ala. 62; State v. Pennyman, 68 Iowa, 216. For such evidence to have the force of a presumption two requisites are necessary, first, the possession must be recent, and second, no reasonable explanation offered by the defendant. One more requisite is necessary in cases of burglary not required in larceny, *i. e.*, that there must be proven other criminating circumstances sufficient to establish the additional element in the crime of burglary not necessary in the latter. With that additional requisite presumption of guilt arising from the possession of stolen property is the same under indictments for either larceny or burglary. In the case of Lehman v. State, 18 Tex. App. 174, the court gave a clear statement of the general rule: "The possession of stolen property, whether recent or remote, is a circumstance admissible in evidence to be considered by the jury in connection with the other proof in the case. But to warrant the inference of guilt from possession alone the possession must be a personal one; must be recent and unexplained; and must involve a distinct and conscious assertion of claim by the possessor." The citation of a few well considered cases will serve to make clear the exact value of such evidence. Possession of a stolen article raises a presumption of theft by the possessor only in case such possession is so recent after the theft that the possessor could not have well come by it except by stealing. Gregory v. Richards, 8 Jones (N. Car.), 410. In order that recent possession of goods shall be admissible as against the defendant the goods must be identified as those stolen. Possession of stolen property a day and a half after the theft, with no attempt to explain the possession on arrest, and no proof of good character, will support a conviction. Brown v. State, 59 Ga 456. The possession of stolen property five or six months after its theft, is not sufficiently recent to raise a presumption that its possessor stole it. Vaughn v. State, 17 Tex. App. 562. The mere fact that stolen hides were found in defendant's barn which was shown to be open to any one choosing to enter it, will not justify an inference of guilt; and until defendant's declaration that he knew nothing about the hides being there is shown to be false, he is not called upon to make explanation as to how the hides came there. People v. Hurley, 60 Cal. 74. If stolen property is found in the possession of accused he is not required to show to the jury's satisfaction that he acquired it honestly in order to overcome the presumption of guilt raised by such possession, but it is sufficient if his explanation of possession raises a reasonable doubt as to whether he honestly acquired the property or not. State v. Miner (Iowa 1899), 78 N. W Rep. 656. The presumption of guilt arising from the possession of property recently stolen is one of fact, and hence a charge that such possession is "in law a strong criminating circumstance," is error. Van Straaten v. People (Colo. 1899), 56 Pac. Rep. 905. Where other facts and circumstances besides possession of the stolen property are relied on by the prosecution, an instruction that recent unexplained possession is not sufficient to sustain a conviction unless defendant was called upon at the time to explain such possession, or unless his right to it has been challenged, is properly refused. Brooks v. State (Tex. Crim. App.), 47 S. W. Rep. 640. Where property has been stolen and recently thereafter it is found in the possession of another, such person is presumed to be the thief, and in the absence of other rebutting evidence, if he fail to account for his possession of such property in a manner consistent with his innocence this presumption becomes conclusive against him. State v. Jennings, 81 Mo. 185. Where the only evidence of theft is defendant's possession of the property, his declarations respecting possession when he was first charged by the owner, are admissible as explaining that possession, and therefore part of the *res gestæ*. Walker v. State, 28 Ga. 254. A person charged with larceny may explain his possession of the stolen property by showing what was said to him at the time he acquired possession. State v. Jordan, 69 Iowa, 506.

We shall now notice a few of the late cases on this subject under indictments for burglary. These cases well illustrate the great division of authority on this often raised point of law. The general rule is that the recent unexplained possession of property stolen from the burglarized premises, is *prima facie* proof of the defendant's guilt of the burglary. Davis v. State, 76 Ga. 16; Smith v. People, 115 Ill. 17; Magee v. State, 130 Ill. 138; State v. La Grange, 94 Iowa, 60; Branson v. Commonwealth, 92 Ky. 330; Harris v. State, 61 Miss. 304; State v. Butterfield, 75 Mo. 297; State v. Moore, 117 Mo. 395; Morgan v. State, 25 Tex. App. 513. Authorities holding *contra:* People v. Flynn, 73 Cal. 511; Steuart v. People, 42 Mich. 255; Metz v. State, 46 Neb. 547; People v. Hart, 10 Utah, 204; Gravely v. Commonwealth, 86 Va. 396; Ryan v. State, 88 Wis. 486. These cases simply deny that such evidence furnishes any *prima facie* proof of defendant's guilt, or that it has any greater weight than other evidence introduced at the trial. Where it is shown that a larceny and burglary were committed by the same person at the same time, and the goods taken at the time of the burglary are found in the possession of a person soon after the occurrence, this is *prima facie* evidence that he is guilty of both offenses. Defendant's exclusive possession of property which has been recently stolen by burglars, is presumptive evidence of his being guilty of both burglary and larceny, but his possession jointly with another person is no proof of his guilt. State v. Warford, 106 Mo. 55. On indictment for burglary evidence that the stolen articles were found the next morning in the possession of defendant, who gave a false account of how he obtained them, is sufficient to warrant a conviction. Wynn v. State, 81 Ga. 744.

In conclusion it may be said that the rule sustained by the weight of authority is that evidence of the possession of stolen property, whether recent or otherwise, is simply evidence to be considered by the jury along with other facts, but would not of itself be

sufficient to warrant a conviction. If it is further proven, however, that the property was only recently stolen, and the possession of the accused is not explained, a *prima facie* case is made out. If a reasonable explanation is offered by the defendant, however, the *prima facie* case is rebutted and the burden is on the State to prove the explanation to be false. Declarations of the defendant explanatory of his possession at the time of his arrest or at his first opportunity to make an explanation are a part of the *res gestæ* and competent evidence for or against him.

CORRESPONDENCE.

EXEMPTIONS UNDER THE BANKRUPT ACT.

To the Editor of the Central Law Journal:

Thinking it would be of interest to many of the readers of your journal, on account of its general application throughout many of the States, we write to call your attention to a decision rendered on February 20th, last, by the United States District Court for this district (Lowell, J.), in the case of Frank Turnbull, bankrupt. In that case we claimed, under section 6 of the Bankrupt Act, which allows to bankrupts "the exemptions which are prescribed by the State laws," that a watch belonging to the bankrupt was exempt under the laws of this State, either as "necessary wearing apparel," or as one of the "tools, implements and fixtures necessary for carrying on his trade or business." The court, in its opinion, says in regard to the claim that the watch was "necessary wearing apparel:" "This court has to interpret the provisions of a State law, and is bound to adopt the interpretation put thereon by the State courts. Unfortunately the courts of Massachusetts have not definitely interpreted the statute, and there is the utmost confusion in the constructions put by the courts of other States upon provisions more or less similar to those of the public statutes of Massachusetts. There is no prevailing consensus of opinion that a watch is or is not 'wearing apparel,' or is or is not 'necessary' to a debtor. In Mack v. Parks, 8 Gray, 517, it was determined that a watch upon a debtor's person was not liable to attachment, 'according to the principles of the common law as adopted and practiced in Massachusetts.' Somewhat incidentally Mr. Justice Bigelow observed, in the course of the opinion, that the watch was 'retained as part of his dress or apparel,' and that it was 'liable to attachment if it had been taken by the defendant when not connected with the person of the plaintiff.' These statements, both made *obiter*, do not convince me beyond a doubt that the Supreme Court of Massachusetts would not consider itself bound by them to hold either that a watch is 'wearing apparel,' or that it is not 'necessary wearing apparel;' but, as the statement last quoted has stood unchallenged upon the books for more than forty years, its authority in determining the construction to be placed upon the statute, though perhaps not of the weightiest, is yet sufficient to turn the scale when that scale is otherwise pretty evenly balanced. Upon the whole, too, a watch does not seem to me included within the natural meaning of the words 'necessary wearing apparel.' I hold, therefore, that a watch is not exempt under the Bankrupt Act as 'the necessary wearing apparel' of the bankrupt."

In regard to the contention that the watch was a tool or implement of the bankrupt's trade or business, the court said: "In his petition in bankruptcy the petitioner stated that he was a plumber, but there was no evidence how he followed his trade, or how his watch was necessary to him therein. As was said above, the burden of proof is upon the bankrupt, and the fact that he is a plumber does not of itself establish that he needs a watch in his trade. To carry on some kinds of trade or business a watch may be reasonably necessary, and so it may be exempt. That this is so deprives of most of its weight the argument of hardship, which was urged against the construction just placed upon the first clause of section 34" (relating to necessary wearing apparel).

The decision of the referee in this case, which was reviewed by the district court, is reported in 5 Am. B. R. 231. We might add that the cases upon which the bankrupt chiefly relied to sustain his contention that the watch was necessary wearing apparel were McClung v. Stewart, 12 Oreg. 431, where the language of the statute construed was identical with that of the Massachusetts statute; Sellers v. Bell, 2 Am. B. R. 529, 544, where the language of the statute was "necessary and proper wearing apparel;" Brown v. Edmonds, 8 S. Dak. 271; Davlin v. Stone, 4 Cush. 359; Townes v. Pratt, 33 N. H. 347; *Re* Jones, 3 Am. B. R. 259; *Re* Smith, 3 Am. B. R. 140. The cases relied on to sustain the claim that the watch was an implement of the bankrupt's trade were Rothschild v. Boelter, 18 Minn. 302; Woods v. Keyes, 14 Allen, 236; Hamilton v. Lane, 138 Mass. 358, and Bitting v. Vanderburgh, 17 How Pr. 80. It will be noticed that the decision of the court in the Turnbull case is directly in conflict with that in McClung v. Stewart, *supra*, and apparently in conflict with the decision of the Circuit Court of Appeals in Sellers v. Bell, *supra*, although the language construed in that case was "necessary and proper wearing apparel." It would seem to be well settled by the authorities that a watch can properly be considered "wearing apparel," but on the question whether it is "necessary wearing apparel" there is considerable difference of opinion among the courts, and it is to be hoped that the question will be finally decided in one way or another in the near future. It is obvious that this question is one of importance, not merely in connection with bankruptcy proceedings, but in determining whether or not, in levying an execution, a watch can be levied upon where the statute exempts from execution "necessary wearing apparel," or the tools or implements necessary to the debtor's trade or business.

We have not undertaken to state the case in such form as you might desire to describe it in your publication, but leave it to you to make such a statement of it, based on this letter, as you may think worth while. Yours very truly,

HOOPER & FLINT.

Boston, March 26, 1901.

BOOK REVIEWS.

BISHOP ON STATUTORY CRIMES.

A book written by Joel Prentiss Bishop needs no commendation by us. He has been too long and too favorably known by the profession to be susceptible to any conclusions of ours. This is the third edition. The first was published in 1873; the second in 1882. The present edition is edited by Marion C. Early of the St. Louis Bar. Mr. Bishop in his various treatises on criminal law seems to have covered the entire field,

and it is perhaps most remarkable that his various books on criminal law and criminal procedure have, without exception, given entire satisfaction, in fact have been found indispensable to the profession. His four volumes on criminal law and the law of criminal procedure, while complete in themselves so far as intended, do not cover any portion of the topics discussed in this volume on *Statutory Crimes*, which is an exposition of the general principles of statutory interpretation, elucidating the special principles of interpretation of criminal law and their specific applications, and discusses such topics as the statute of limitations in criminal causes, pleadings upon private statutes and municipal by-laws, and also discusses offenses which are purely statutory in distinction from mere statutory extensions of common-law crimes. Division V of this book is devoted to statutory extensions of common-law offenses which, though analogous to some common-law inhibitions, are properly included in this volume. Mr. Bishop has a wonderful faculty for condensation. No author has ever so successfully achieved the distinction of being able to so condense his ideas as to crowd into one volume matter that most writers would require two volumes to properly elucidate. The author has made six divisions of this volume calling them books on: written law classified and explained; the interpretation of written laws absolute, and with the unwritten; special interpretations pertaining to the criminal law; the procedure on written laws; statutory extensions of common-law offenses; offenses more purely statutory.

The editor of the third edition of this book is Marion C. Early of St. Louis. Although he has not added a large amount of matter as designated by physical measurement, he has added much to its usefulness. Whether he deemed it necessary to continue in the course pursued by Mr. Bishop of crowding a quart of ideas into a pint of words, or whether this faculty of condensation is inherent in Mr. Early, we are not advised. Among his valuable additions we call attention to his note 1, to section 22, as to discretion of municipal corporations in determining what is a nuisance, and note 8, to section 12, that *ex post facto* laws, though unconstitutional, yet laws regulating rules of procedure will be upheld, also laws changing rules of evidence and rendering that admissible which was inadmissible at the time of the arrest of the accused are not unconstitutional. Note 4, to section 92, relating to narrow and technical reasoning not applied to constitutions; note 2, to section 104a, custom or usage, if ever admissible to construe an act of congress, must be general; note 3, to section 181, relating to a law repealing the provisions of another law; section 597a relating to polygamy; note 2, to section 860, money paid on gaming contract may be recovered back; and in Missouri money lost in speculation in grain, against public policy. (This court has, since the publication of this book, gone back on itself by making penalty inoperative if either party alleges that the betting was intended to be outside the borders of the State. Evidently they have found a new definition of public policy.) Also a very valuable and lengthy note on pages 631, 632, and 633, on liquor selling involving interstate commerce, in which Mr. Early cites and discusses the various important decisions of State and United States Supreme Court. Mr. Early has preserved the original text of Mr. Bishop in its entirety. Some additions have been made to the text, but the larger portion of Mr. Early's work is embraced in his copious notes in which is much new matter, and 4,000 new citations of authorities. The volume contains over 1,000 very large octavo pages printed on excellent paper, handsomely bound in law sheep. Published by T. H. Flood & Company, Chicago.

HUMORS OF THE LAW.

Rufus Choate, it will be remembered, died at Halifax, N. S. His body was conveyed by rail to St. John, N. B., thence by steamer to Boston. While it was being carried from the station to the pier in St. John it was followed by a large concourse of curious people. The gathering attracted the attention of persons in a building on a side street at the head of which it was passing.

"Hello!" said one of them. "What's the crowd about?"

"I'll go and see," volunteered a lanky, retired seafaring man turning a quid of tobacco in his mouth.

Accordingly he went to the corner and inquired of a passer by the cause of the commotion.

"Lawyer Choate," was the laconic reply.

Returning to his friends, he spat out his tobacco, sat on the edge of a work bench, and with a half exultant grunt exclaimed, "Only a darned lawyer choked."

WEEKLY DIGEST

1. ACTION ON COUNTY WARRANTS.—A county court or board of county commissioners being wholly a creature of statute, when the statute is not strictly pursued the acts of such court or board are void and without force or effect; but it does not follow that under no circumstances can a liability be created when the statute is not in all respects pursued, or when some members of the court or board are guilty of fraud with reference to some part of a transaction.—AUERBACH v. SALT LAKE COUNTY, Utah, 63 Pac. Rep. 907.

2. ADVERSE POSSESSION—Color of Title—Ejectment.—It is essential to color of title, relied on to support a claim of title by a limitation, that the premises shall be described in the deed with the same degree of certainty that is required in a deed relied on as an absolute conveyance.—ALLMENDINGER v. MCHIE, Ill., 59 N. E. Rep. 517.

3. APPEAL — Constitutional Question — Who may Raise.—The contention that a new incorporation of a city, bringing in people who were not formerly in the city, without giving them any opportunity to be heard, is in violation of their constitutional rights, cannot be made by the city on behalf of such people, who have not objected to the incorporation on that

ground so as to raise a constitutional question for the purpose of a direct appeal to the Supreme Court of the United States from a circuit court under the judiciary act of 1891, § 5 (26 Stat. at L. 828, ch. 517), in an action against the city on unpaid coupons for interest on bonds issued after the new incorporation.—CITY OF LAMPASAS V. BELL, U. S. S. C., 21 Sup. Ct. Rep. 368.

4. ATTACHMENT — Garnishment — Intervener. — A claimant to money garnished or property attached cannot intervene and be made a party in an action to which the attachment or garnishment is auxiliary.—STANLEY V. FOOTE, Wyo., 63 Pac. Rep. 940.

5. ATTORNEY AND CLIENT—Authority—Submission to Arbitration.—An attorney at law, as such, has no authority to submit the issues involved in a lawsuit to arbitrators; nor has an attorney in fact such authority, unless specially authorized to that effect. The existence of such power must appear in the record of appeal, and the agent must not pass beyond his powers. Arbitrators are by law required to take an oath before acting under the submission. The agent cannot waive this requirement unless specially authorized by his principal.—KING V. KING, La., 29 South. Rep. 205.

6. BUILDING AND LOAN ASSOCIATIONS—Notice of Forfeiture—Contract.—Plaintiff, who owned shares in defendant building and loan association, made a default in payment on January 26th. On July 11th defendant published a notice, to all delinquent stockholders who had been in default six months or more, to pay in 60 days, under penalty of forfeiture, and a copy was sent to plaintiff under a *bona fide* belief that he fell within the class described in the notice. Held, that plaintiff was not entitled to rescind the contract on the ground that defendant had wrongfully declared it forfeited, since sending the notice under a *bona fide* belief that plaintiff's stock had been forfeited did not constitute a repudiation of the contract by defendant.—DALEY V. PEOPLE'S BUILDING, LOAN & SAVINGS ASSN., Mass., 59 N. E. Rep. 452.

7. CARRIERS OF GOODS—Bill of Lading—Removal of Freight.—Notwithstanding a bill of lading provided that the railroad company would not be liable as a common carrier after the freight had reached its destination, public policy so modified the contract as to give the consignee a reasonable time within which to remove the goods after arrival before such liability ceased.—TALLAHASSEE FALLS MFG. CO. V. WESTERN RY. OF ALABAMA, Ala., 29 South. Rep. 203.

8. CARRIERS OF PASSENGERS—Baggage—Limitation of Liability.—Civ. Code, § 2176, declares that a passenger or consignor, by accepting a contract for carriage, with knowledge of its terms, assents to any limitation of liability stated therein; and section 19 declares that every person who has notice of circumstances sufficient to put a prudent man upon inquiry has constructive notice, where by prosecuting inquiry he might have learned them. Held that, in an action for the loss of a trunk, it was error to refuse to charge that if, when a receipt which limited the carrier's liability was delivered to plaintiff, the circumstances were such that a prudent man would have read the limitation as to liability, then he had notice thereof, and that it would not excuse him to say that he did not read the notice of limitation.—MERRILL V. PACIFIC TRANSFER CO., Cal., 63 Pac. Rep. 915.

9. CARRIERS OF PASSENGERS—Loss of Baggage.—M purchased a ticket at Detroit over the D., G. H. & M. R. Co. to Pontiac, and from Pontiac to Imlay City over the defendant's railroad. He presented the ticket to the agent of the D., G. H. & M. R. Co., and had his trunk checked to Imlay City. He purchased the ticket for the sole purpose of checking his trunk. He did not intend to go on the train, and did not go, but went by his own private conveyance. His trunk arrived at Imlay City Saturday morning at about 10 o'clock, remaining upon the platform until noon, when the agent put it in the baggage room. Saturday or Sunday night the baggage room was burglarized, and the trunk and contents stolen. Held, that M was not in the position of a *bona fide* passenger, that the defendant was not an ordinary warehouseman, bound to the exercise of that care which the average man takes of his own property, but was a gratuitous bailee, liable only for gross negligence.—MARSHALL V. PONTIAC, O. & N. R. Co., Mich., 85 N. W. Rep. 242.

10. CARRIERS OF PASSENGERS — Negligence—Street Railroads—Instructions.—A charge that, before a passenger can recover for personal injuries, he must show, by a preponderance of the evidence, that he received the injury complained of, that the negligence of defendant was the proximate cause thereof, and that he was free from contributory negligence, is not erroneous, when considered in connection with a charge that negligence is the failure to do or the doing of some act which it is their duty to do, and that defendant, while not an insurer of the safety of passengers, is bound to exercise the highest degree of care practicable, under the circumstances, for their protection.—CITIZENS' ST. RY. CO. V. MERL, Ind., 59 N. E. Rep. 491.

11. CONSTITUTIONAL LAW—Sidewalks—Special Tax—Front-Foot Rule.—The sidewalk act of 1875, and an ordinance under it providing for a sidewalk to be constructed by the lot owners, the cost to be apportioned according to frontage, and to be paid by special taxation, do not contravene Const. U. S. Amend. 14, prohibiting the State from depriving any person of his property without due process of law, and from denying to any person within its jurisdiction the equal protection of the laws, though making no provision that the cost or amount of tax shall not exceed the benefits to the property, or for hearing on the question of benefits.—JOB V. CITY OF ALTON, Ill., 59 N. E. Rep. 622.

12. CONSTITUTIONAL LAW—State Board of Dentistry—Appointment of Members.—Const. art. 15, § 1, provides that all officers whose appointments are not otherwise provided for in this constitution shall be chosen in such manner as now is or hereafter may be prescribed by law. Acts 1899, p. 479, authorized the State dental association to appoint three members of the board of examiners for licensing persons to practice dentistry. Held, that the act was constitutional, though conferring a power of appointment on a private corporation, because of provision permitting an appointment in "such manner as may be prescribed by law."—OVERSHINER V. STATE, Ind., 59 N. E. Rep. 468.

13. CONTEMPT—Punishment.—A judgment or order of the court that the defendant be committed to the county jail until he obeys said order, and until the further order of the court or judge thereof, upon a conviction for contempt in refusing to obey an order of the court requiring him to pay certain permanent alimony, is void for the reason that the duration of sentence is indefinite and uncertain.—EX PARTE CURTIS, Okla., 63 Pac. Rep. 963.

14. CONTRACT—Building Contract—Compliance with Specifications. — A building contract provided that payments were to be made only on written orders from the architect as the work progressed, and that only an order for final payment should be considered an acceptance of the work. Held, that the contention that the question whether plaintiffs' acceptance of the building had dispensed with the obtaining of the architect's certificate was not in the case, because the contract did not provide that plaintiff's right to recover should depend on obtaining the certificate, could not be sustained.—GILLIS V. COBE, Mass., 59 N. E. Rep. 455.

15. CONTRACT — Conditions of Payment. — Under plaintiff's contract for furnishing to defendant material for paving which he had contracted to do for a city, providing that within 60 days after bonds for the

payment of his contract with the city were delivered to him, he would pay them, plaintiff's right to payment does not depend on defendant's being paid by bonds or otherwise, but they are merely to delay demand for payment till 60 days after the time he should become entitled to receive bonds from the city under his contract with it.—DAUGHERTY v. HECKARD, Ill., 59 N. E. Rep. 569.

16. CORPORATION—De Facto Corporation—Suit to Annul Charter.—A *de facto* corporation may be treated as such by the State and brought into court as the party defendant, without making its members parties, for the purpose of obtaining a decree against it to annul its charter on the ground that the incorporation was illegal because made for an illegal purpose.—NEW ORLEANS DEBENTURE REDEMPTION COMPANY OF LOUISIANA v. STATE OF LOUISIANA, U. S. S. C., 21 Sup. Ct. Rep. 378.

17. CORPORATIONS—Unauthorized Contracts—Ratification.—Where, in an action to enforce a contract made on behalf of a corporation by an unauthorized agent, the evidence tends to show that the corporation, by acquiescence and acceptance of benefits, ratified such contract, an instruction which, in effect, withdraws such evidence from the consideration of the jury, is erroneous.—ALEXANDER v. CULBERTSON IRRIGATION & WATER POWER CO., Neb., 85 N. W. Rep. 283.

18. COUNTIES—Bonds—Subscription to Railroad Stock.—Where bonds were issued by a county in payment of a subscription for railroad stock, the fact that unfilled promises were made by officers of the railroad, to citizens of the county, that the road would run through the county, to induce them to vote for the subscription, will not affect the right of innocent purchasers of the bonds for value to recover thereon.—CARPENTER v. GREENE COUNTY, Ala., 29 South. Rep. 194.

19. COURTS—Jurisdiction — Waiver.—Where a court has no jurisdiction over the particular cause or of the person of the defendant, and the defendant appears specially for the purpose of calling the attention of the court to such irregularities, and the court thereupon overrules his motion to such jurisdiction, he may save his exception, file his answer, and proceed to trial without waiving such error; and he may take advantage of such error on appeal to a higher court.—CHICAGO BLDG. & MFG. CO. v. PEWTHERS, Okla., 63 Pac. Rep. 964.

20. CRIMINAL LAW—Assault—Resistance to Arrest.—In a prosecution for an assault committed while resisting an officer, accused being discovered in the act of attempting to break into a dwelling house in the nighttime, it is no defense that accused were acquitted of the technical charge of burglary.—MCMAHON v. PEOPLE, Ill., 59 N. E. Rep. 584.

21. CRIMINAL LAW—Banks — Insolvency—Receiving Deposits.—Under the provisions of chapter 219, Gen. Laws 1895, which makes it a felony for any one connected with a banking concern, either public or private, to receive deposits while such institution is insolvent, it is not material in what capacity the interested or guilty party is connected with the bank,—whether as an ostensible partner, or as a secret conspirator with the actual operator of the same,—provided any substantial aid is given by him tending to violate the statute in letter or spirit.—STATE v. CLEMENTS, Minn., 85 N. W. Rep. 229.

22. CRIMINAL LAW — False Pretenses—Indictment.—An indictment is not insufficient by reason of any imperfection in matter of form, which does not tend to prejudice the substantial rights of the accused, but the specific facts constituting the elements of the crime charged must be set forth with reasonable certainty to inform the defendant of the nature of his offense, which is his constitutional right, of which he cannot be deprived.—STATE v. CLEMENTS, Minn., 85 N. W. Rep. 284.

23. CRIMINAL LAW — Habitual Criminals—Additional Punishment.—Imposing a heavier punishment upon a person convicted of a felony, as prescribed by Mass. Stat. 1887, ch. 485, § 1, if he has twice before been convicted of a crime for which he has been sentenced to imprisonment for not less than three years, does not impose any additional punishment for the former crimes, and is therefore not in violation of constitutional provisions against *ex post facto* laws or putting persons twice in jeopardy.—MCDONALD v. COMMONWEALTH, U. S. S. C., 21 Sup. Ct. Rep. 389.

24. CRIMINAL LAW — Indictment—Presenting False Claims—Duplicity.—In a prosecution under Burns' Rev. St. 1894, § 2858, providing that whoever, knowing the same to be false, shall present for payment to the county auditor or other officer any claim, false or fraudulent, for the purpose of procuring the allowance of the same, or an order for payment thereof, shall be imprisoned, etc., an indictment charging that defendant, with intent to cheat and defraud, filed a false and fraudulent claim against the county, "for the purpose of securing its allowance by the board of commissioners, and procuring an order on the county for payment thereof," was not bad for duplicity.—FERRIS v. STATE, Ind., 59 N. E. Rep. 475.

25. CRIMINAL LAW—Instructions.—Under the laws of this territory, the giving of oral instructions by the court to the jury, if objected to by the defendant, and when exceptions are saved thereto, is reversible error. But every communication between the court and the jury on the trial of the cause is not necessarily an instruction. Only when the statements of the court amount to a positive direction as to the law of the case will such statements be regarded as an instruction, within the meaning of the statute requiring the instructions of the court to the jury to be in writing.—BOGGS v. UNITED STATES, Okla., 63 Pac. Rep. 969.

26. CRIMINAL LAW — Murder by Poisoning — Manslaughter.—Burns' Rev. St. 1894, § 1977 (Horner's Rev. St. 1897, § 1904), declares that whoever purposely, and with premeditated malice, or by administering poison or causing the same to be done, kills any human being, is guilty of murder in the first degree. Section 1981 (section 1908) provides that whoever unlawfully kills any human being without malice, either voluntarily on a sudden heat, or involuntarily, but in the commission of some unlawful act, is guilty of manslaughter. Cr. Code, §§ 259, 260 (Burns' Rev. St. 1894, §§ 1908, 1904), authorize the jury, on an indictment for an offense consisting of different degrees, to find the defendant not guilty of the degree charged in the indictment, and guilty of any lower degree, or of an attempt to commit the offense, and in all other cases to find the defendant guilty of an offense the commission of which is necessarily included in that with which he is charged. Held, that the jury had the power to find a person charged with murder in the first degree, by administering poison, guilty of voluntary manslaughter, notwithstanding the difficulty of seeing how poison could be administered in a sudden heat.—HASENFUSS v. STATE, Ind., 59 N. E. Rep. 463.

27. CRIMINAL TRIAL—Murder—Misconduct of Judge.—Where a trial judge in a prosecution for murder used language to the defendant from which the jury might well infer that the latter was making orations and arguments instead of answering questions, and that he was recalcitrant and misbehaving as a witness, while there was nothing to warrant such language, and the judge clearly intimated to the jury that defendant's story, if true, was inconsistent with his knowledge of any fact tending to prove that a certain other, and not he, committed the crime, such acts of the court were greatly prejudicial to defendant, and reversible error.—SYNON v. PEOPLE, Ill., 59 N. E. Rep. 508.

28. DEEDS — Descent and Distribution.—Where a father, who was involved in an insolvent bank, conveyed property to his daughter by a deed which was

immediately recorded, and on the same day the daughter executed and delivered a deed of the same property to her father, which was not recorded, but found among his papers at his death, and there was no change in the possession of the property, and he borrowed money thereon, having his daughter execute the mortgage, the title was in the father, and the property descended to his heirs, notwithstanding he had made contradictory statements as to the title.—SHEPLEY v. LEIDIG, Ill., 59 N. E. Rep. 579.

29. DESCENT AND DISTRIBUTION—Succession—Estoppel—Forced Heir.—One cannot renounce the succession of an estate not yet devolved; nor can any stipulation be made with regard to such a succession, even with the consent of him whose succession is in question. The acceptance or rejection made by an heir before the succession is opened is absolutely null, and can produce no effect.—SUCCESSION OF JACOBS, La., 29 South. Rep. 241.

30. DIVORCE—Cruelty.—There must be physical violence, or acts or threats raising reasonable apprehension of bodily harm, to constitute "extreme and repeated cruelty," declared a ground of divorce by Rev. St. ch. 40, § 1. It is not enough that one cruelly and heartlessly neglects his wife, failing to provide her with suitable shelter, clothing, and food.—MADDOX v. MADDOX, Ill., 59 N. E. Rep. 599.

31. DRAINAGE DISTRICTS—Annexation—Res Judicata.—Judgment in proceedings to organize a drainage district, holding that certain lands are so situated that they should not be included, is not so decisive as to the *status* of the lands as to prevent their annexation, on the owners thereof subsequently connecting them with the ditches of the district, which by the statute authorizes annexation.—PEOPLE v. COMMISSIONERS OF BUG RIVER SPECIAL DRAINAGE DIST., Ill., 59 N. E. Rep. 605.

32. ELECTIONS — Members of Legislature.—The provisions of Const. art. 6, § 10, making each house of the legislature the judge of the election and qualifications of its members, is an exclusive grant of power to each house, forbidden to be exercised by article 5, § 1, by any person in the exercise of powers belonging to a different department of the government, and the courts have no jurisdiction to try and determine contests for seats in the legislature.—ELLISON v. BARNES, Utah, 63 Pac. Rep. 899.

33. ELECTIONS — Voters — Temporary Residents.—Where persons went to a village just a sufficient length of time before an election to give them the 30 days' residence required, and did no work there for which they were paid, paid no board,—some of them boarding with an assistant of a candidate,—and left again immediately after the election, they were not legal voters.—SORENSON v. SORENSON, Ill., 59 N. E. Rep. 555.

34. ESTOPPEL IN PAIS.—When a person has done or said something with intent to influence the dealings of another, and that other has acted upon the faith of it, the former ought not to be permitted to change it to the injury of the latter.—CURL v. RUSTON STATE BANK, La., 20 South. Rep. 284.

35. EVIDENCE AT FORMER TRIAL — Admissibility.—It is error to permit a party to read in evidence material testimony of a witness given at a former trial unless it appears that the witness is dead.—WABASH R. CO. v. MILLER, Ind., 59 N. E. Rep. 485.

36. GUARANTY — Statute of Frauds.—Where L promised a grocer that he would pay for whatever supplies the grocer would furnish C, and the grocer extended credit to L, and looked to him for payment, such grocer could recover from L despite the fact that he charged the supplies on his books against C and L, since the charge on the books was not conclusive in determining to whom credit was given.—LUSK v. THROOP, Ill., 59 N. E. Rep. 529.

37. HIGHWAYS—Location—Compensation.—A decree laying out a street 120 feet wide prescribed the grade along its center line. The construction of the street at the prescribed grade to a width of 60 feet long its center line was completed. The board of aldermen assessed the betterments on abutters, which they could not legally do till the construction was completed. Held, that the decree did not require construction for the entire width of the road, and the damages to an abutting owner's property outside that location should be assessed according to the actual construction, and not as if the street were graded to the full width of its location.—COMO v. CITY OF WORCESTER, Mass., 59 N. E. Rep. 444.

38. HUSBAND AND WIFE — Community — Legal Services to Wife.—The fee of the attorney of the wife, who has successfully prosecuted to judgment a suit for separation from bed and board and separation of property against her husband, is a just and valid charge against the community, and may be recovered on a *quantum meruit*.—BENEDICT v. HOLMES, La., 29 South. Rep. 256.

39. JUDGMENTS—Bill to Set Aside—Fraud in Obtaining.—A compromise judgment will not be set aside on the ground of fraud, because of representations by the defendants that they were without property and that nothing could be realized by execution against them, when no representations are made with respect to the merits of the cause of action, and especially where the complaint itself is based upon the fact of their insolvency.—UNITED STATES v. BEEBE, U. S. S. C., 21 Sup. Ct. Rep. 871.

40. LANDLORD AND TENANT—Leases—Assignment.—Where the provisions of a lease of land on which a hotel was to be erected and kept by the lessee contemplated the assignment thereof with consent of the lessor, and the lessor did consent to an assignment, he cannot afterwards object that the lease is a contract for personal services requiring skill, which cannot be assigned.—CLEVELAND, C., C. & ST. L. RY. CO. v. WOOD, Ill., 59 N. E. Rep. 619.

41. LIFE INSURANCE—Death by Assured's Wrongful Act.—Where an insurance policy provided that if the insured should die, within three years of the date of the policy, in consequence of his own criminal action, the company would not be liable for an amount greater than the premiums paid, and the company had tendered the amount of the premiums in its plea, a contention of the company, in seeking to avoid the payment of the premiums, that the policy was void because of false representations of the insured, was without merit.—HALEY v. PRUDENTIAL INS. CO., Ill. 59 N. E. Rep. 545.

42. MASTER AND SERVANT — Contracts — Sunday.—Where plaintiff agreed to give his entire time and attention to the business of defendant, and there was evidence that the business was conducted on Sundays, an instruction that it was not plaintiff's duty to work on Sunday was erroneous, as that fact would depend on the custom in the business.—COLLINS ICE-CREAM CO. v. STEPHENS, Ill., 59 N. E. Rep. 524.

43. MASTER AND SERVANT—Negligence—Assumption of Risk.—Where a servant who had been working about three weeks in a factory sustained injuries by his sleeve being caught in a setscrew on the shaft while oiling it, and there was uncontradicted evidence that the screw could be seen from the floor, the servant must be regarded as having assumed the risk.—DEMERS v. MARSHALL, Mass., 59 N. E. Rep. 454.

44. MECHANICS' LIENS — Purchase for Particular Building.—Where special findings showed that the material was sold to the contractor and charged to him and was used in the construction of a building, but did not state that plaintiff furnished the material for the particular building on which he sought to enforce a lien, it cannot be maintained.—MILLER v. FOSDICK, Ind., 59 N. E. Rep. 488.

45. MINES—Adverse Claimant—Citizenship—Appeal.—Where an adverse claimant to a mining claim did not object at the trial to the failure of the applicant to

prove citizenship, such objection cannot be raised for the first time on appeal.—SHERLOCK v. LEIGHTON, Wyo., 63 Pac. Rep. 934.

46. MINING—Tenants in Common—Receiver.—Mere colorable ouster on the part of a tenant in common who is in possession of a mining claim by the consent of a co-tenant who has brought a suit for partition, and the mere fact that the care of the property involves considerable expense, will not authorize the appointment of a receiver pending the final hearing of the suit.—HEINZE v. KLEINSCHMIDT, Mont., 63 Pac. Rep. 927.

47. MORTGAGES — Chattel Mortgages—Statutes—Validity.—A mortgage of a leasehold interest in land, with the improvements thereon, which the lessee had a right to remove at the expiration of the term, on certain conditions, was a mortgage of an interest in real estate, and hence invalid, under Civ. Code, § 2947, declaring that any interest in real estate capable of being transferred may be mortgaged.—MCLEOD v. BARNUM, Cal., 63 Pac. Rep. 924.

48. MORTGAGES—Foreclosure—Sale.—Under 2 Starr & C. Ann. St. 1896, p. 1468, ch. 41, § 5, which provides that, if the mortgagee of lands mortgaged by a husband prior to his marriage shall cause the lands to be sold, the widow of the mortgagor shall be entitled to dower in any surplus of the proceeds of the sale that may remain after payment of the mortgage debt and costs; a widow is entitled to dower in such surplus only, and not in the gross proceeds, where the lands are sold on the petition of the administrator, to pay a mortgage given by her husband before their marriage.—VIRGIN v. VIRGIN, Ill., 59 N. E. Rep. 586.

49. MORTGAGE—Satisfaction — Usury.—A mortgage given to secure the payment of a usurious contract is satisfied by the payment of the principal debt, whereupon the mortgagor is entitled to satisfaction of such mortgage of record; and, upon failure of the mortgagee to so satisfy said mortgage of record, an action for such relief will lie, under the provisions of section 3364, Rev. St. Idaho.—CLEVELAND v. WESTERN LOAN & SAVINGS CO., Idaho, 63 Pac. Rep. 885.

50. MORTGAGES—Tax Titles in Mortgagor.—Where a man mortgaged two pieces of land, one of which he afterwards deeded to his wife, and both pieces were sold for taxes levied subsequent to the mortgage, and bought by the mortgagor in the name of his wife, who afterwards assigned to him so much of the certificate as would cover his portion of the premises, the wife would not be permitted to set up the tax title thus acquired to defeat the mortgage, since such purchase amounts merely to a payment of the tax.—CHAMBERLAIN v. FORBES, Mich., 86 N. W. Rep. 253.

51. MUNICIPAL CORPORATIONS — Improvements — Special Assessments.—An ordinance for special assessment for paving streets, which did not specify the quality and dimensions of the "flat stones" on which the curbstones were to rest, though defective, was not void, and was no ground for objections to a judgment of sale of land for non-payment of assessments.—JOHNSON v. PEOPLE, Ill., 59 N. E. Rep. 515.

52. MUNICIPAL CORPORATION — Lateral Support — Measure of Damages.—Under Const. art. 2, § 13, providing that private property shall not be taken or damaged for public use without just compensation, an owner of property deprived of its lateral support by the city cutting down the street on which it was located can recover only the difference in the market value of the property before and after the improvement, considering the benefits of the improvement.—SCHROEDER v. CITY OF JOLIET, Ill., 59 N. E. Rep. 550.

53. MUNICIPAL CORPORATION—Paupers—Support by Private Persons.—There is no legal obligation resting on a municipal corporation to maintain or relieve poor persons in the absence of a statute creating one, and the court has no power, upon the ground of moral obligations or the equities of any given case, to hold such a corporation liable to a private person who may have relieved or supported a poor person.—PATRICH v. TOWN OF BALDWIN, Wis., 85 N. W. Rep. 274.

54. MUNICIPAL CORPORATIONS—Street Improvements—Ordinance.—A city ordinance authorizing the laying of a combined curb and gutter with a center foundation 6 inches in depth, the curb to be 6 inches in thickness throughout, and the gutter flags to be 18 inches in width, the top of the curb to be at the established grade of the street, was insufficient to authorize a judgment confirming a special assessment, since it does not specify the height of the combined curb and gutter.—WILLIS v. CITY OF CHICAGO, Ill., 59 N. E. Rep. 543.

55. NATIONAL BANKS—Pledgee as Stockholder of.—A bank which receives as collateral security for a note the stock of a national bank, and on default proceeds to sell the stock and bid it in, is not liable as a stockholder in the national bank, where it never has a transfer of the shares made on the books of the national bank, and as between the pledgee bank, and the debtor, who claims that the sale is invalid, the stock continues to be held merely as collateral for his debt.—ROBINSON v. SOUTHERN NATIONAL BANK OF NEW YORK, U. S. S. C., 21 Sup. Ct. Rep. 383.

56. NEGLIGENCE — Fire Escapes — Assumption of Risk.—One, by accepting employment of a tenant in a building not supplied with fire escapes, as required by law, does not necessarily assume the risk therefrom.—LANDGRAF v. KUH, Ill., 59 N. E. Rep. 501.

57. NUISANCE—Pleading — Estoppel.—Where, in a suit to enjoin the maintenance of a disorderly beer garden in the vicinity of plaintiff's residence, where liquor was unlawfully sold, the answer alleged that defendant established the beer garden more than 18 years before commencement of suit, and long before plaintiff purchased his lot and built his residence, and that plaintiff had not objected to defendant's expenditures, though he knew of them, it was proper to sustain a demurrer, since plaintiff was not estopped from demanding a cessation of the nuisance causing him special injury.—KISSEL v. LEWIS, Ind., 59 N. E. Rep. 478.

58 PRACTICE AND PLEADING — Modifying Instructions.—Code Civ. Proc. § 473, providing that the court, in its discretion, may allow an amendment to any pleading or proceeding, does not authorize the superior court to amend a bill of exceptions which had been settled and used on a motion for a new trial before an appeal had been taken from the order denying the motion, since after appeal the court was deprived of jurisdiction, and could not change the record on which it acted in denying the motion.—BAKER v. BORELLO, Cal., 63 Pac. Rep. 914.

59. PUBLIC LANDS — Grant—Receiver's Certificate.—Where a party holds lands under a grant confirmed by act of congress, followed by surveys locating the lands of the grant in place and by possession extending back more than 70 years, he will be protected from a claim under a certificate from the receiver of the land office showing an entry of a date subsequent to the original claim, and the party in possession under the confirmed grant may plead prescription.—TEDDLIE v. MCNEELY, La., 29 South. Rep. 347.

60. QUIETING TITLE — Ejectment—Res Adjudicata.—Plaintiff had executed an alleged deed to defendant conveying 10 acres in fee, and the timber on an adjoining 70 acres. Two actions in ejectment had been brought by plaintiff against the defendant for the 10 acres of land, in which the validity of the deed had been put in issue, and both suits had been determined against the plaintiff. Held, in a proceeding in equity to have the deed canceled, to remove the cloud from the title to the timber, that the plaintiff was precluded from questioning the execution of the deed, as its validity was *res adjudicata*, since there was identity of the right in the two actions on which the judgment was involved.—MCGRANTT v. BAGGETT, Ala., 29 South. Rep. 199.

61. RAILROAD COMPANY—Negligence—Injury to Person on Track.—The parties in charge of a railroad train do not perform their whole duty, under all circumstances, by pursuing the regulation method of giving notice by the ringing of a bell, or following out any prescribed mode of giving warning. The precautions to be adopted and the steps to be taken in aid of safety increase as the danger of accident and injury is increased, and their sufficiency is to be gauged by what is called for by the circumstances of each case. —DOWNING v. MORGAN'S L. & T. RY. & S. S. CO., La., 29 South. Rep. 207.

62. RAILROAD COMPANY — Street Railroads—Right of Public to Use Street.—Though street cars have a superior right of way to the general travel on streets at places other than crossings, to the extent that those traveling by other means must get off the tracks and give way to moving cars, still the general public have the right to use and travel on the entire street, and are not to be treated as trespassers.—NORTH CHICAGO ST. R. CO. v. SMADBAFF, Ill., 59 N. E. Rep. 527.

63. REFORMATION—Mistake—Evidence.—In an action to reform a written instrument on the ground of mistake, a court of equity will not only reform the instrument in which the mistake occurred, but all subsequent instruments which have perpetuated such mistake, so as to administer a full measure of relief, avoid circuity of action, and promote justice.—MARKS v. TAYLOR, Utah, 68 Pac. Rep. 697.

64. RELIGIOUS SOCIETIES—Expulsion of Member—Injunction.—The supreme tribunal of a religious denomination will be enjoined from expelling a member of a local congregation for alleged spiritual offenses, when it appears that such tribunal has not been organized in conformity with an organic law of the church.—HATFIELD v. DE LONG, Ind., 59 N. E. Rep. 485.

65. REPLEVIN — Forthcoming Bond — Validity.—A forthcoming bond given by defendant in replevin bound the obligor to the sheriff, instead of to the plaintiff, as required by Mills' Ann. Code, § 85; but it was conditioned for the delivery of the property, or the payment of its value to plaintiff, and not to the sheriff, the nominal obligee. Held, that the bond was valid, and binding on the sureties as a common-law obligation.—SMITH v. STUBBS, Colo., 68 Pac. Rep. 966.

66. SLANDER—Presumptions—Liability of Husband. —The husband not shown to have been cognizant of the slanderous utterances of his wife is not liable therefor.—MCCLURE v. MCMARTIN, La., 29 South. Rep. 227.

67. STATUTE—Constitutionality of Statute—Legislative Powers.—2 Burns' Rev. St. 1894, § 237 (Horner's Rev. St. 1897, § 237), providing that crimes and misdemeanors shall be defined by statute, and not otherwise, and like statutes, cannot restrict the future action of the legislature, and later enactments inconsistent therewith must be regarded as the law, and, in the absence of definitions in statutes creating crimes and misdemeanors, they may be defined by the court acting judicially, as contemplated by the legislature in such cases.—COOK v. STATE, Ind., 59 N. E. Rep. 489.

68. TAXATION—Non-resident.— Where a resident of Indiana has credits due in Illinois, but has no office or residence or resident agent in the latter State and the notes and papers evidencing the credits are kept at his home, he cannot be taxed in Illinois for such credits, though he comes into the State one day each month to transact business, since the property which is taxable as credits is not the obligation of the debtor to pay, but the legal right of the creditor to demand and recover the debt.—HAYWARD v. BOARD OF REVIEW OF CHRISTIAN COUNTY, Ill., 59 N. E. Rep. 601.

69. TROVER — Conversion — Possession. — Where plaintiff's property, at the time it was attached by defendant, was in possession of W, under a contract that W should have the use of the property for a term not then expired, and then either purchase or return it, plaintiff cannot maintain trover against defendant for conversion of the property, since the action of trover at common law could be maintained only by one in possession or having the right to the possession of the property converted, which was not changed by Pub. St. ch. 167, § 1, providing that there should be three divisions of personal actions, and that the division of actions for torts should include that theretofore known as trover.— RAYMOND SYNDICATE v. GUTTENTAG, Mass., 59 N. E. Rep. 446.

70. VENDOR AND PURCHASER—Assignment of Lien.— On the consummation of a sale of land by the execution and delivery of a bond for title and purchase-money notes, the land in equity becomes that of the vendee, and the vendor retains only a lien on the land in the nature of a mortgage, and a transfer of the notes carries with it the lien, which the transferee may enforce in equity.—LEWIS v. SHEARER, Ill., 59 N. E. Rep. 580.

71. VENDOR AND PURCHASER—Sale—Surrender—Warranty.—Under Comp. Laws, § 9609, providing that no estate or interest in lands other than leases, etc., shall be created or surrendered unless by act or operation of law or by deed or conveyance in writing, the purchaser in a land contract cannot surrender his interest under such contract by parol. — STEWART v. MCLAUGHLIN'S ESTATE, Mich., 85 N. W. Rep. 266.

72. WILLS—Construction—Distribution.—Where a will declared that there should be deducted from a son's share as devisee whatever sum the testator should be compelled to pay "as one of his bondsmen," the condition applied to notes on which the testator was surety, as against the son's creditors, as the word "bondsmen" did not necessarily import an obligation under seal.—HABERSTICH v. ELLIOTT, Ill., 59 N. E. Rep. 557.

73. WILL—Holographic Will — Execution. — A holographic will, with a regular testation clause, was found among the valuable papers of the testator, who was familiar with the formalities required in the execution of wills. It was shown that his signature was genuine, and that the attesting witnesses signed the attestation clause at his request and in his presence. Held, sufficient to show that his signature was on the instrument at the time it was subscribed by the attesting witnesses, though they testified that they failed to notice it.—GOULD v. CHICAGO THEOLOGICAL SEMINARY, Ill., 59 N. E. Rep. 536.

74. WILLS—Life Estates—Widowhood.—Where testator gave to his wife during her widowhood all his lands and all his personal property unconditionally, after her death all the property, real or personal, of which she died possessed, to go to his son on condition that he pay the widow's just debts and funeral expenses, the widow took only a life estate in both the real and personal property without condition during the time she held it, which estate might be terminated by her second marriage.—KRATZ v. KRATZ, Ill., 59 N. E. Rep. 519.

75. WILL—Vested Legacies—Charge on Real Estate.— Testator bequeathed to his wife all his personalty, and $3,000, to be raised and paid as directed in the will, and to each of his children $50, to be raised in the same manner. He then authorized his executrix "to sell and convey, or not to sell, at her discretion," any or all the real estate, at such time or times, and on such terms, as she might deem best for the estate, and out of the proceeds, if sale was made, she was directed to pay legacies, the residue of the proceeds to be safely invested, and at the death of his wife he directed that such of his real estate as remained undisposed of, and the proceeds of such as had been sold, should descend to his children. Held, that the legacies to his wife and children were vested, and at once became a charge on all his real estate, and so remained until satisfied, though the testatrix made no sale.—STICKEL v. CRANE, Ill., 59 N. E. Rep. 595.